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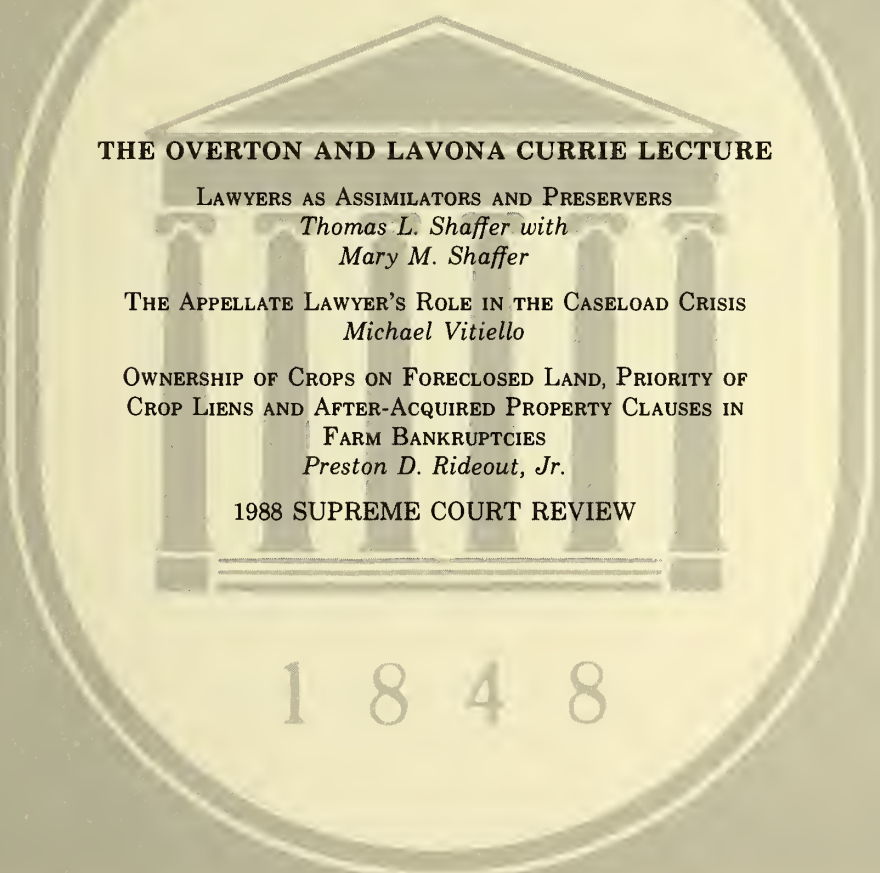

THE OVERTON AND LAVONA CURRIE LECTURE

LAWYERS AS ASSIMILATORS AND PRESERVERS
Thomas L. Shaffer with
Mary M. Shaffer

THE APPELLATE LAWYER'S ROLE IN THE CASELOAD CRISIS
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1988 SUPREME COURT REVIEW

VOLUME 58 WINTER 1988 NUMBER 3

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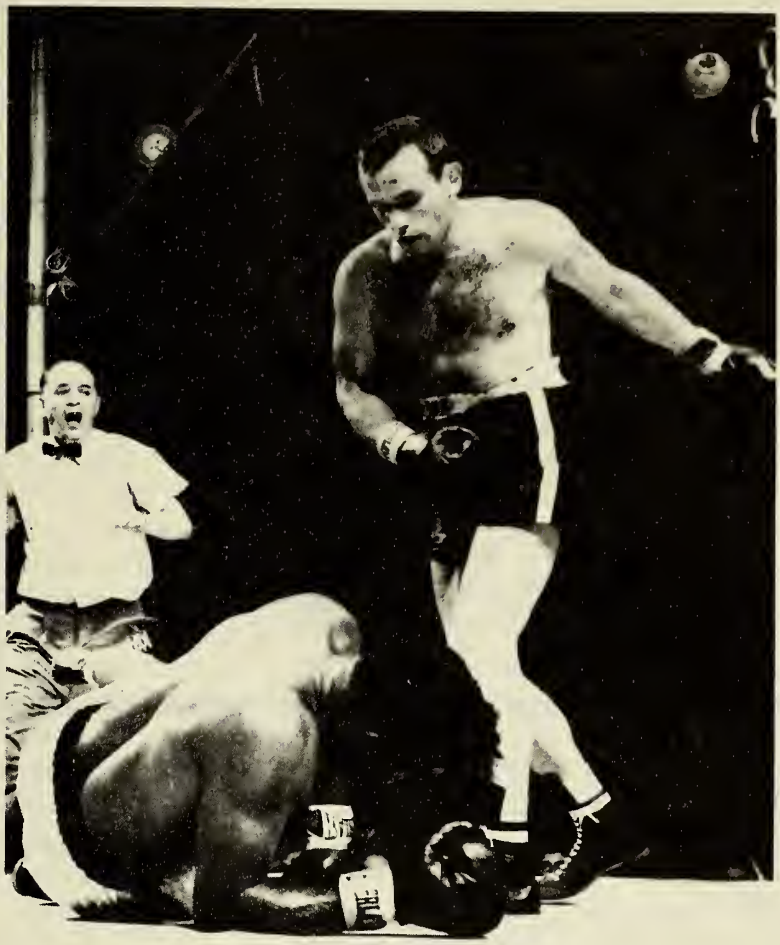

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DEDICATION

*Aaron S. Condon**

Professor Aaron S. Condon will retire from the faculty of the University of Mississippi School of Law at the close of the Spring 1989 term. His influence as a teacher and a colleague will be sorely missed by students and faculty alike.

Aaron joined the law school faculty in 1966, coming from private practice in Kosciusko, Mississippi. He quickly became recognized as a wit and a philosopher - homespun or otherwise. He regaled us with stories of "providence," possum neck, and the legion of fascinating people he has known in his lifetime. We all learned that Aaron is a living oxymoron: a man who loves the military and abhors discipline; a teacher with the softest of hearts who gives the lowest of grades; and an intellectual who easily relates to the rural and uneducated that he encounters. He is, indeed, a rare specimen.

Perhaps Aaron's most telling attribute is his willingness to do whatever is required to help others. As he once said, when agreeing to undertake a certain distasteful assignment, "If you need someone to play second base, I'll play second base." There is no way to guess the number of law students who have been helped, materially and otherwise, by him. He has seen to their needs in the hospital, extricated them from problems with the authorities, and given them the benefit of his time, intellect and effort in dozens of other ways.

After twenty-three years on our faculty, he has hung it up. I

---

* Aaron Storer Condon, originally from Kosciusko, Mississippi, received his B.A. from the University of Alabama in 1950. He subsequently gained his J.D. from the University of Mississippi in 1952. Mr. Condon is a retired colonel of the United States Army Judge Advocate General's Corps, having served from 1946-47 in Belgium and Germany and from 1952-55 in Japan. He returned to private practice in Kosciusko in 1957 and remained there until 1966. During this time, he served as County Attorney for Attala County from 1960-66.

Mr. Condon began his tenure at the University of Mississippi School of Law in 1966 as an assistant professor of law. He became an associate professor of law in 1970 and was promoted to full professor of law in 1972. Over his distinguished career, he has taught Civil Procedure, Criminal Procedure, General Practice, Mississippi Circuit Court Practice, Mississippi Practice, Readings in Law, and Torts.

He and his wife, Lillene, have two daughters. They are Catherine Condon Lassiter, an attorney in Little Rock, Arkansas, and Carol Condon, a paralegal in Nashville, Tennessee.

believe that I speak for everyone connected with the law school when I say that we are better off because our paths have run parallel to his for so long a time. "Doc," we hate to see you step down, and we hope that you won't become a stranger.

William M. Champion

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THE OVERTON AND LAVONA CURRIE LECTURE

THE LECTURE

The Overton and Lavona Currie Lecture Series was established in 1988 by Overton Anderson Currie, a 1949 honor graduate of The University of Mississippi School of Law, and his wife, Lavona. Mr. Currie, a native of Hattiesburg, Mississippi, attended Marion Institute (Alabama) before receiving a B.B.A. from The University of Mississippi in 1948. Throughout his undergraduate and law school years, Mr. Currie was very active in extracurricular activities as well as achieving academically. He served on the Moot Court Board, was associate editor of the *Mississippi Law Journal*, and graduated valedictorian of his law school class.

After practicing law and serving as county prosecuting attorney in Hattiesburg for six years following law school, Mr. Currie did graduate work at both Columbia Theological Seminary and Emory University Divinity School. He received an LL.M. degree from Yale, where he also took courses at the Yale Divinity School and the Yale Medical School.

Overton Currie is now a partner in the Atlanta law firm of Smith, Currie and Hancock, where he specializes in construction law. Mrs. Currie is the former Lavona Stringer of Booneville, Mississippi. The Curries have four childrenn.

Reflecting Mr. Currie's impressive academic background and wide-ranging interests, the Lecture Series is intended to be interdisciplinary in nature and to expose students to a broad range of knowledge and ideas.

LAWYERS AS ASSIMILATORS AND PRESERVERS*

*Thomas L Shaffer***
*with Mary M. Shaffer****

> In one sense he is the salt of humanity with his tremendous energy and ambitions. But being salt, he gives humanity high blood pressure. He's neither a real Jew nor a real Gentile. He has no roots in any group. He digs all the time in other people's soil, but he never reaches any roots. He tries consciously and subconsciously to wipe out the individuality of nations and cultures. Like those who built the Tower of Babel, he often tries to transmute the whole world into one style. He often preaches a sort of liberalism which is false and is the opposite of liberal. The worst thing about the assimilationist is that he has no pride. He always wants to be where he is not wanted . . . . The idea of roots is not to deny anything. You have to make the best of your origin and your upbringing. You did not grow up in a vacuum . . . . If you are going to write a cosmopolitan novel, just about a human being, you will never succeed, because there isn't such a thing as 'just a human being.'
>
> *Isaac Bashevis Singer*[1]

The United States, more than most nation-states, has a history of confrontations between one culture and another, and of law as a means of ending cultural confrontations. Again and again in America, our dominant Anglo-Saxon Protestant culture

---

* A shorter version of this paper was presented as the inaugural Overton and Lavona Currie Lecture at the University of Mississippi School of Law, February 15, 1989.

** B.A., J.D., LL.D.; Robert and Marion Short Professor of Law, University of Notre Dame; member of the Indiana Bar.

*** B.A., University of Virginia. Mary M. Shaffer studied at the Universities of Siena and Pavia and taught in Italy, 1985-1988; she is a graduate student in Italian literature at Johns Hopkins University.

[1] I. Singer and R. Burgin, Conversations with Isaac Bashevis Singer 63-64 (1985).

has dealt with an alien culture and, as the story is usually told, overcome it. The dominant culture has used the law to bring the vulnerable culture into conformity to what we have referred to as "the American way."

This has been true where the vulnerable culture came to us- as was true of the African slaves and of the European immigrants who came to farm the Midwest and to tend the machinery of the industrial Northeast. It has been true also when the dominant culture was the invader, as was the case, all over the continent, when our European ancestors settled in territories populated by native Americans — from the commercial adventurers of the Southeast, to the Pilgrims in Massachusetts Bay, to the Conquistadores among the Navajo, to Father Junipero Serra among the Indians of California, to my pioneer ancestors among the Arapaho of central Wyoming.

Coercive law has been the means of domination, more than overt force, in all of these cases; cultural domination has been turned over to lawyers more often than it has been turned over to soldiers. In most cases lawyers have served the function soldiers would have: The professional mission was conquest. Law was force used by the dominant culture, and lawyers were the legions of the law. If the dominant society has sometimes become liberal toward the conquered, the result in the American case — unlike that of the Romans or biblical conquerors — is that the law dealt with the individual, not with the conquered culture. Our liberal jurisprudence speaks in terms of individual rights — rights not of a culture or a people, but rights of individuals who are considered one at a time, and dealt with in terms defined by the individualistic law and morals of the dominant culture. That was true of the nation-state's treatment of the Mormon culture that found biblical warrant for the practice of polygamy in the 19th century;[2] it has been true, so far, of Indian tribes that use hallucinogens in religious ritual;[3] it was true a few years ago of a Jewish military chaplain who wanted to

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[2] Reynolds v. United States, 98 U.S. 145 (1878). *See* Kendall White's brief discussion in S. Hauerwas, S. Levinson, and M. Tushnet, *Faith in the Republic*, 45 WASH. AND LEE L. REV. 467, 492 (1988) (hereinafter *Faith in the Republic*).

[3] Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 808 (1963).

wear a yarmulke under his military hat.[4]

American constitutional law deals with vulnerable cultures in terms of the rights of individuals. It ignores or at least bypasses cultures by focusing on the individual as if he were the cause of his own culture. But the law's narrow focus on rights does not dispose of cultures; the law can only pretend that cultures are absent. Judge Learned Hand, for example, wrote some of the opinions for the federal court of appeals in a series of cases involving a clause in the immigration statute that says an immigrant applying for citizenship is required to demonstrate that he has "good moral character."[5] Such cases raised the cultural question of what character means, and often involved a confrontation between two cultures. They involved evidence of mercy killing,[6] or living with a person of the opposite sex without benefit of marriage,[7] of visits to prostitutes,[8] and, in one case, an applicant who had married his niece[9] — a practice that was not considered immoral in his immigrant culture but was immoral so far as the executive branch of the federal government was concerned.

These situations were typically situations in which the dominant culture had already prevailed: The marriage to a niece, for example, was illegal and invalid, as much as a polygamous Mormon marriage would have been. The issue was what good moral character meant; there were at least three ways available to impose the dominant culture's position on what good moral character meant: One would have been to consult public opinion. Hand declined to do that; he thought it wasn't judicial. He consulted

---

[4] Goldman v. Weinberger, 475 U.S. 503 (1986). *See* Mark Tushnet's discussion in *Faith in the Republic*, at 470-71.

[5] Note, *Aliens — Naturalization — Good Moral Character as a Prerequisite*, 34 NOTRE DAME L. REV. 375; *see* J. O'Meara and T. Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME L. REV. 1, 6 n.13, 10 n.23 (1964); Special Project, *Jurisprudence — Naturalization — Moral Standard*, 33 MARQ. L. REV. 202 (1950).

[6] Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).

[7] Petitions of Rudder, et al., 159 F.2d 695 (2d Cir. 1947); *see also* Estrin v. United States, 80 F.2d 105 (2d Cir. 1935).

[8] Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949)(discussing United States v. Manfredi, 168 F.2d 752 (3d Cir. 1948)).

[9] United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).

precedent and judicial instinct instead, as more appropriate to his office. A second method, one suggested to him by a law review editor, would have been to claim universal validity, "immutable objective morality," for American culture;[10] Hand did not discuss that, but there was warrant for it in the precedents. The third method would have spoken of a right to a cultural view of marriage — saying, in effect, that such a marriage is not allowed but a person has a right to believe privately that it should be; the individual has that private right. Character requirements cannot intrude into that privacy.

Judge Hand can be read to have taken the third alternative.[11] He can also be read to have taken the vulnerable immigrant culture into account in deciding what good moral character meant. He was reactively calm in such cases — he usually ordered the government to grant citizenship — perhaps because he saw himself, a lawyer and a judge, standing between two cultures and having to deal with the morals of each, rather than as a dispenser of rights to individuals. The possibility suggests what I would like to talk with you about — the lawyer, not as an agent of conquest, a manager of the law of the dominant culture as a means of security from the vulnerable culture, but as a legal professional who stands between two cultures and uses his or her professional status as a way to fit them together.

A rather different example here is the group of black civil-rights lawyers that gathered in the 1930s and 1940s around Dean Charles Hamilton Houston: Thurgood Marshall, Spottswood Robinson, William Hastie, James W. Nabrit, Jr., Robert L. Carter and Oliver W. Hill. They were the architects of a stunning change in American constitutional law. It took years of wary, wily, patient lawyers' work in scores of cases.[12] It was an argument over three decades, and it was an argument between cultures. Although we talk of it as a matter of rights, it was at its

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[10] *See* Special Project *supra* note 5.

[11] *See supra* note 6; *compare* In re Spenser, 22 F. Cas. 921 (D. Oregon 1878).

[12] R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); G.R. McNeil, *Charles Hamilton Houston: Social Engineer for Civil Rights*, in J.H. FRANKLIN & AUGUST MEIER, BLACK LEADERS OF THE TWENTIETH CENTURY 221-240 (1982), excerpted in T. SHAFFER, AMERICAN LEGAL ETHICS 546-55 (1985).

deepest not that at all. It was argued in those terms because it had to be; that was the category laid down by the dominant culture.

But this movement, from the *Gaines* case in 1938 through the last of the education cases in the 1970s, was an argument not for individual rights but for participation in America by a culture of oppressed people.[13] That is why integrated education was critical in Dean Houston's view: The law's task, as he saw it, was to fit two cultures together. It would not have been enough to confer rights on the individual black person. Neither Houston nor the great prophet of the movement, Dr. King, argued from Hobbs and Rousseau; Dr. King argued from the Bible.[14] Black people in America are, like biblical Israel, a people.[15]

* * *

Let me see if I can pose this proposition with a couple of anecdotes. I am a descendant of frontier women and cowboys. I am the only male in three generations in my family who is not a cowboy (and my wife sometimes wonders about me). All four of my grandparents and four of my great-grandparents homesteaded in Montana, Wyoming, and Colorado. My maternal grandfather was one of the first law-enforcement officers in Hot Springs County, Wyoming. As far as I can tell, he was the very first who was earnest about bringing law and order to Thermopolis, a little cow town that, in those days, had more saloons than it had churches. My parents' people were Baptist settlers; they went to churches, not to saloons; they sank roots and tried to make a living from raising the gentle, durable little Hereford

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[13] I am grateful for the unpublished scholarship of Steven Hobbs on this point; see my brief discussion of it in Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699 (1988).

[14] J. MCCLENDON, JR., BIOGRAPHY AS THEOLOGY: HOW LIFE STORIES CAN REMAKE TODAY'S THEOLOGY 265-286 (1974).

[15] And, like Moses, Dr. King said to the dominant culture: Let my people go. Kluger, *supra* note 12, at 128. " 'Frankly,' says a Howard law graduate who went on to become a federal judge, 'the purpose there then was to learn how to bend the law to the needs of blacks.' Beyond that . . . was Houston's belief that a law case was a splendid opportunity to lead and teach the black population in whatever community the case arose." The Dean was so earnest in this that he had at first preferred to avoid the federal courts and argue his cases before local judges and juries — i.e., to argue them as confrontations between cultures rather than as matters of federal constitutional right.

cattle that British investors imported into the Mountain West at about the time my ancestors settled there.

The Herefords shared those mountains and prairies with native wild life; the cows and the settlers had to learn to share their world with creatures who were there first. You may remember Jim Burden's grandmother, in Willa Cather's *My Antonia*, deciding to put up with the badger in her garden, even though, as she put it, "He takes a chicken once in a while, but I won't let the men harm him. In a new country a body feels friendly to the animals. I like to have him come out and watch me when I'm at work."[16] But the settlers also took what God had provided for them in nature: They killed the animals they needed for food, when they needed food. I can remember going for two weeks with our neighbor, who had a summer ranch in the mountains: We took some flour, sugar, baking powder, and a bag of apples, but no meat. The first thing we did when we got to the summer camp with our pack horses was to kill a deer.

We had, even as late as my childhood in western Colorado, a settled, white-man's frontier culture. The dominant culture had come to it, much as the Pilgrims had come to Massachusetts, and there were confrontations. Game and fish laws are an example; with those laws came peace officers who had the power to arrest a cowboy who killed a deer for his summer food — out of season, without a license, and when he was not wearing the prescribed clothing.

Farrington Reed Carpenter tells of coming in 1912 from the Harvard Law School to practice law in the town of Hayden, in Routt County, Colorado.[17] Hayden is a cow town, still under 2,000 in population, on the road from Steamboat Springs to Craig, not far from where I grew up. The first thing Carpenter says he noticed in Hayden, an event that had a lot to do with his learning to practice law there, was a confrontation between the dominant culture and the vulnerable culture. The dominant culture came to town in the person of a game warden named Hob-

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[16] W. CATHER, MY ANTONIA 17 (1918).

[17] F. CARPENTER, CONFESSIONS OF A MAVERICK: AN AUTOBIOGRAPHY (1984). The excerpt I use here, which is reproduced in my AMERICAN LEGAL ETHICS, at 530-35 (1985), was first published at 8 COLORADO LAWYER 212 (1979).

son. He came from eastern Colorado, settled in a bit, and obtained from Denver official credentials that empowered him to enforce the game and fish laws. Officer Hobson arrested a rancher named Matt Gates, at Gates' ranch, on the charge of having there killed three sage chickens out of season.

"News of this arrest spread like wildfire and aroused great indignation all over the county," Carpenter said. "Many of the inhabitants felt they had a constitutional right to shoot sage chickens any time they wanted to on their own land, for their needs. A committee of the most prominent citizens . . . tried to persuade James C. Gentry, the District Attorney, to dismiss the case. When Mr. Gentry refused, they came back predicting that he would be overwhelmingly defeated at the next election.

"On the day the case was called in the . . . log cabin courthouse, the room was crowded with concerned spectators . . . . Officer Hobson took the stand, and Mr. Gentry had him tell what he had seen the accused do. Finally, Gentry asked him, 'Are you sure it was sage chickens that were killed?'

" 'Yes,' answered the witness, 'I took possession of them as evidence, and placed them in a gunny sack in the vault of the Courthouse. They are here with me today.'

" 'Show them to the jury,' demanded Mr. Gentry in a stentorian voice. The witness carefully emptied the sack in front of the jury.

"Three dead owls fell out.

"Hobson turned plaintively to the Judge and said, 'Your Honor, someone has played a joke on me' . . . . Against a background of feet shuffling on the floor, the Judge beckoned the Sheriff and ordered him to escort the witness out of the courtroom."

"The Sheriff took Hobson out the back door and he was never seen again in Routt County," Carpenter says. He leaves us to our own conclusions as to how the owls got into the gunny sack. I think we are free to guess that the District Attorney knew the answer. He was a lawyer standing between cultures. Maybe he manipulated the facts a bit, as Faulkner's Gavin Stevens, Mississippi county attorney, did in similar cases.[18]

---

[18] I have in mind the episode in which bootleg whiskey is found in Montgomery

The other anecdote comes from Utica, New York. In the first few years of this century — a decade before Farrington Carpenter went from Cambridge to Hayden to practice law — there was in Utica, as in many American cities, a community of immigrants from southern Italy. There were a couple of Italian-language newspapers published there, both of which carried items of local interest to those who could read Italian or had someone who could read it to them. One was called *L'Avvenire*; the other was *La Luce*. There is a series of stories in those papers about an immigrant who stood between the two cultures in Utica — a man named Nick Camelo.

Signor Camelo was, functionally, as much a lawyer as James Gentry in Hayden or Gavin Stevens in Jefferson, Mississippi — although Camelo was not educated or licensed to be a lawyer. Nick Camelo first appears in the news in 1900, when he was elected secretary of a company that manufactured liqueurs.[19] He appears again in 1902 when he was nominated by both police and fire commissioners to be *speciale polisie della citta di Utica*, a representative to these agencies, apparently, from the Italian community. The writer for *L'Avvenire* said the commissioners could not have chosen a better person "than this fine young man who willingly lends himself for the good of all."[20]

The same paper reported the next year that Camelo had managed to get one Michele Lombardi out of prison. Signor Lombardi was unjustly sentenced, *L'Avvenire* said, by a judge in Greene, New York, on a charge of third-degree assault. He was accused by his wife Carmela of, as the newspaper reported it, *aggressione*. "Young and valiant Nick Camelo," the story said, was able to obtain an annulment of the sentence and Lombardi's liberation from prison.[21] *La Luce* reported the same story and added the fact that it had cost Camelo two hundred dollars[22] —

Ward Snope's back-alley picture room, with the consequence that M.W. is sent to the state penitentiary instead of federal prison. W. FAULKNER, THE TOWN 154-76 (1957) (ch. 10)(Vintage ed. 1961). Faulkner dedicated the novel to Oxford lawyer Phil Stone: "He did half the laughing for thirty years." *Id.*

[19] L'Avvenire, Nov. 10, 1900.

[20] L'Avvenire, Jan. 11, 1902.

[21] L'Avvenire, Jan. 10, 1903.

[22] La Luce, Jan. 10, 1903.

the paper didn't say to whom the money was paid or where Camelo got it. He was functioning according to the dominant culture's requirements, but possibly with the methods and values of the vulnerable culture. He was clearly functioning as a lawyer.

In 1904, *L'Avvenire* reported that Camelo had defended an Italian immigrant who was stopped on the street, taken to prison, and fined fifty dollars. This person was unable to pay the fine and had been in prison fifty-nine days before Camelo learned about him.[23] Camelo had, by this time, apparently left the liquor business and was operating as a notary public and banking and steamship agent for families who sought to bring relatives to this country from Italy. He was also working as an interpreter in the city court, the paper said.[24]

Camelo was asked to run for alderman in Utica in 1905; he declined, but he said he would continue to listen to his people.[25]

* * *

We propose to look more closely at the situation displayed in these stories from Hayden and from Utica, to look at the lawyer as he stood in these stories between a dominant culture and a vulnerable culture. We want to suggest that such a legal figure has two ways of using his legal power to deal between cultures — ways that are different in their effect on both cultures. One way is to conform the vulnerable culture to the dominant culture: We will call that the way of *assimilation.*[26]

The other way is to protect the vulnerable culture and, as the lawyer manages to locate openings in the law and politics of the time, to manipulate the dominant culture into coming to terms with the vulnerable culture. We will call that the way of

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[23] L'Avvenire, Feb. 10, 1904.

[24] L'Avvenire, Sept. 12, 1903; Feb. 20, 1904; June 11, 1904.

[25] L'Avvenire, Aug. 26, 1905.

[26] I Oxford English Dictionary 510 (1933) gives five definitions of assimilation: (1) the state of being like, or similarity, resemblance; (2) the action of becoming conformed; (3) the acknowledgement of likening; (4) "conversion into a similar substance," which is physiological but also metaphorical, as in Burke's reference to "the sentiments which beautify and soften private society"; and (5) the change of bodily fluids after death, into "the nature of any morbific matter" (pathology), a usage that has metaphorical promise for the thesis of this paper.

preservation. In America, both methods have resulted in substantial freedom for the individual in the vulnerable culture, but the freedom that has resulted from assimilation has been a freedom expressed in theories of rights, and therefore a freedom that belongs to the individual without regard to his culture. He is, in one way of putting it, free to believe in his old vulnerable culture or to abandon it. If the vulnerable culture is in some way preserved in him, or through him, it is not because the culture has value but because the individual has rights.

The freedom that results from the preservation of culture is different ethically and politically: If the vulnerable culture is preserved rather than assimilated, it is usually because the dominant culture accords it value and — to use a word the Italian immigrants used — respect. That means the dominant culture has rendered itself vulnerable: It has put itself in a position to learn from the vulnerable culture. It is in danger of change as a result of what it learns. (The Civil Rights Movement's partial success is, again, the most prominent modern American example.)

I. Two Models

About a decade after Nick Camelo told the voters of Utica that he would prefer not to be an alderman, but would continue to listen to his people, Salvatore A. Cotillo functioned in a licensed capacity as a lawyer in Little Italy, in Harlem. Cotillo was a preserver. I want to linger over his story. It is available in English.[27]

Cotillo's family emigrated from Naples in 1892, when Salvatore was six years old. He went to school in New York. He earned a law degree from Fordham in 1911 and was admitted to the New York Bar in 1912. He would later be the first Italian-American to serve in either house of the New York Legislature (he served in both), and the first to sit on the bench of the New York Supreme Court. But in the days when he was acting as

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[27] N. Ferber, A New American: From the Life Story of Salvatore A. Cotillo, Supreme Court Justice, State of New York (1938)(hereinafter Ferber); T. Henderson, *Immigrant Politician: Salvatore Cotillo, Progressive Ethnic*, 13 Int'l Migration Rev. 81 (1979); *cf.* Salvatore A. Cotillo, Italy During the World War (1922).

Nick Camelo had in Utica, he was a lawyer practicing in the street in front of his father's gelato and pastry shop on East 116th Street.

Cotillo was a scrivener for his clients, most of whom could not read or write in either language. "He was . . . required to translate intimately personal letters, business papers and legal documents," his biographer says. "Neighbors and friends sought his aid in the preparation of applications for various licenses, or petitions on behalf of their relatives who wished to emigrate to the United States. Cotillo served an apprenticeship in human problems . . . ."[28] Cotillo was the only lawyer in the neighborhood; his biographer says there were forty or fifty Italian-American lawyers working there thirty years later.[29]

Cotillo, like Camelo, advised and represented his clients as they faced the world outside their Italian neighborhood. "Many problems were personal; but some had a community aspect and Cotillo was exhilarated by the challenge they offered to find a solution . . . . An earnest group of the more frequent callers regarded him as their leader in planning for the realization of a better life for their immigrant neighbors."[30]

One way to put the comparison of assimilation and preservation is to ask a question about this "better life," a question also about what *L'Avvenire* meant when it said Nick Camelo, although he had been *speciale polisie*, declined nomination for alderman and said he would continue to listen to his people. These lawyers interpreted one culture to the other. When they were willing to mute or even renounce the power they had to serve the conquerors, they interpreted powerless cultures to powerful cultures. Signori Camelo and Cotillo in this way interpreted the Protestant and Irish-Catholic, English-speaking cultures of Utica and New York City to the vulnerable Calabrian and Sicilian cultures Southern Italians brought to the United States when they came here, eighty years ago, looking for work. And, more significantly we think, they interpreted the Calabrians and Sicilians to New York.

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[28] *See* N. FERBER, *supra* note 27, at 19.

[29] *Id.*

[30] *Id.* at 21.

There is probably a hope, when lawyers interpret in the way Camelo and Cotillo did, that they or their descendants can achieve a cultural synthesis, that they can *put* the cultures together, rather than *fit* them together. There is a hope that the need for interpretation will disappear, because the differences between the cultures will disappear. That, I take it, was the romantic American dream of the melting pot. American lawyers, no doubt, often did what they did because they thought of themselves as guardians of the melting pot. Arthur Miller's Italian-American lawyer, Mr. Alfieri, was a guardian of the melting pot. Marco, the illegal immigrant who had, as we say, taken the law into his own hands, said to Mr. Alfieri, "All the law is not in a book." "Yes," Mr. Alfieri said. "In a book. There is no other law." Mr. Alfieri was an assimilator, and it was important to him that Marco know who wrote the book. Marco had to be conquered; his culture had to become irrelevant. Mr. Alfieri was the servant, not of Marco's culture, but of Marco's rights.[31]

We are going to pass by this melting-pot possibility. We do so for moral reasons. The melting pot meant what Officer Hobson meant when he arrested Matt Gates at the Gates ranch near Hayden — not that the game laws would adjust to ranchers (they never have) but that ranchers would stop shooting sage chickens out of season.

In our opinion, the melting pot is not a desirable possibility; it never was. It was a product of Anglo-Saxon imagination. It did not honestly hope for a synthesis of cultures in America. What "melting pot" meant to Italians who came here at the time Camelo and Cotillo did was that they would melt into the republican society Thomas Jefferson and Benjamin Franklin described: God's New Israel, Jefferson called it. President Reagan said as he left office that America is the keeper of the miracle. There is no trace of Italy in such an imaginary republic — no trace of Latin America or Africa or China, either. From an Italian's point this Jeffersonian vision was dishonest, crude, materialistic, and frantic. Italians, and the lawyers who sought to preserve Italian culture in America, were not interested in being melted into that pot. Americans were, as one immigrant put it, a

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[31] A. MILLER, A VIEW FROM THE BRIDGE 103 (1955) (Bantam ed. 1961).

people who eat their fruit green.[32]

The principal example we will use of the lawyer as *assimilator* is John Horace Mariano,[33] an Italian immigrant, American lawyer, and sociologist, who published in 1925 a book called *The Italian Immigrant and Our Courts*. He was somewhat more successful in his work — or at any rate somewhat more persuasive — than Game Warden Hobson was in Routt County.

The example we will use of the lawyer as *preserver* is Salvatore Cotillo, immigrant lawyer, Tammany Hall politician, and Italian-American leader. (It might be more fun to use Nick Camelo, but we have told you all we can find out about him, and it's not enough for sound scholarship.)

II. John Horace Mariano

Mariano's and Cotillo's vantage points on Italian immigrants confronting American law were substantially identical: Both were in New York City; they were contemporaries. The immigrant families they addressed were in cohesive Italian-American communities; the families they spoke of had immigrant parents and American-born children reaching adulthood as World War I ended. Both Cotillo and Mariano lived and wrote in contemplation of extensive, pervasive prejudice against Italians,[34]

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[32] M. LaSorte, Images of the Italian Greenhorn Experience 147, 195-97 (1985).

[33] Mariano was a psychologist, sociologist, and divorce lawyer, as well as a sometime academic. He died in 1959, at the age of 81, after a long and eminent career in all four disciplines. Two of his books were on psychological problems in marriage; he was counsel for the New York State Psychological Association, for the United Transit Association, and for unions in cases involving the Busch Jewelry Company and its affiliates. He had his education (B.A., LL.B., and Ph.D) from Columbia, and was a member of the New York Bar. The New York Times, Aug. 13, 1972, p. 59 col. 2. His books, for present purposes, include The Italian Immigrant and Our Courts (1925) (hereinafter Courts), and the Italian Contribution to American Democracy, published in 1921 by the Christopher Publishing House in Boston, and republished in 1975 by Arno Press.

[34] Both Ferber and Courts document the prejudice against immigrants and their children, as does any responsible social history of Italians in America. *See, e.g.* LaSorte, *supra* note 32; The Center for Migration Studies of New York, Inc., Images: A pictorial History of Italian Americans (1981) (includes newspaper cartoons); Musmanno, The Story of the Italians in America (1965). The prejudice has not disappeared; it has surfaced in recent political discussions of candidates for national office — Geraldine Ferraro, for example; see the unsigned editorial, Italian Men, The National Review, Nov. 2, 1984, p. 18; and D. Keith Mano, Geraldine Ferraro, The National Review, March 28, 1986, p. 67, for two unsubtle examples, and Judith Ann Warner, Marginality and Se-

and in the last years of open immigration, just before Congress closed the door on Italians in 1924.[35]

Mariano generalized the legal situation as one in which (1) American-born Italian children met the law as delinquents, and (2) Italian families did not turn to the law for protection, for planning, or for rights. In one direction, the social problem Mariano sought to describe was deviance — too much involvement with the law. In the other direction the problem was too little involvement: Individual Italians failed to use American law when they might have used it to ease their adjustment to their new country. Mariano's cure, for both problems, was assimilation.

Mariano said the first generation of Italian-Americans born here were afflicted with a disease. The disease was that they were neither Italians nor Americans. He called them not Italians, but Americans of Italian extraction. Evidence of the disease was that members of this generation were uncommonly present in criminal and juvenile courts.

Mariano's assessment was in two steps (and on each he gave elaborate statistical information): (1) Italian immigrant parents were law-abiding people; the Italian immigrant was not found in the courts, but "his children are met there in overwhelming numbers."[36] (2) These children were not Italians, but they were not Americans either. The cure was *not* to form children in the culture of their parents, but to make them Americans — to keep them from being Italians.

In the first step, Mariano demonstrated that Italian immigrants were law-abiding people.[37] Mariano was vociferous in de-

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LECTIVE REPORTING (doctoral description of the subtle process). FERBER summarizes the situation that Cotillo and Mariano grew up in:

> . . . the olive-skinned, dark-eyed children of Europe's southland were markedly alien breed. . . . Their hands were generally gnarled and stained by grime and soil, hands which fashioned objects, large and small. They performed the heaviest work, burrowing underground in tunnels, erecting sky-piercing, ornate structures, providing healthful sanitation for the many while themselves living under conditions too 'reprehensible' for their so-called betters to contemplate.

FERBER *supra* note 27, at 5.

[35] Immigration Act of 1924, 8 U.S.C. § 145ff (repealed 1952).

[36] *See* COURTS *supra* note 33, at 17.

[37] For example, they were rarely in trouble because of alcohol. Alcohol (wine and

fense of Italian immigrants when, for example, they were said to be unreliable witnesses (and parties) in court.[38] He reacted with umbrage to suggestions by leaders of the American (A.B.A.) and New York bars that Italian-American lawyers and law students lacked the sophistication to carry on the institutions and traditions of American law. ("Is Such criticism just? Hardly!")[39]

So, Mariano asked himself, what was the matter with the first American-born generation? He decided they were not cultural Italians (a disputable assertion at best): "[T]he American of Italian extraction has been born here, passed through our schools and knows little, and appreciates less, of whatever is Italian or pertains to Italian culture."[40] But he was not an American either, or at least not a good American. The schools through which he passed had not (apparently) done for him what school did for Americans whose families had been in this country longer. The schools failed, *but* it was the *families*, not the schools, that had to be reformed.

Mariano thus concluded that the cure lay not in supporting these young people in formation in the law-abiding Italian culture of their parents, but in making them less Italian and more American. For example, three of the commonest juvenile problems among Italian-American children born in this country were truancy, petit larceny, and gambling. (Those may not have been offenses, with the possible exception of petit larceny, in Southern Italy). "A corps of trained and experienced investigators ought to be kept constantly at work on this problem seeking the causes in the different [Italian] homes. . . ." It may be, he said, that Italian children didn't realize the importance of curbing self-expression when it is "tabooed by our man-made [read

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cordials) is, to Italians, food. "[A]buses of it are rarely encountered." *Id.* at 32-35. Among twelve ethnic groups reported on by the Census Bureau in 1910, for juvenile commitments for drunkenness, the Italians were the lowest (Polish the highest). The Italians, Mariano assumes, but does not say, were immigrant children. "The Italian has as much scorn for the individual who debases himself by abusing liquor as he has for the fanatic dry." *Id.* at 35.

[38] *Id.* at 48-49.

[39] *Id.* at 54 (lack of proper regard for the oath).

[40] *Id.* at 51; *see* our "Character and Community: *Rispetto* as a Virtue in the Tradition of Italian-American Lawyers," ___ NOTRE DAME L.R. ___ (1989).

American] laws."[41] Therefore, the cure was to "Americanize" the homes in which the children were growing up; they would learn appropriate reticence from reformed Italian mothers who, he evidently thought, would be like those in Louisa May Alcott stories.

Deeper evidence from the lives of those Mariano was talking about is quizzical — representing, more than anything else, the fact that Italian-Americans of the first generation born in America were ambivalent about being Italians. Helen Barolini's novel, *Umbertina* (1979), describes their painful, hybrid identity through four generations of Italian-American women. Barolini also edited a book of memoirs of Italian-American women, *The Dream Book*, which gives biographical accounts of the situation of Italian-American women. One of these women, Fran Claro, says that the troubles she felt as an Italian-American were the troubles of her mother (a first-generation-born Italian-American). Claro's mother was a person who tried too hard to make herself into an American. She created grief and frustration for her children and for herself. Her story indicates that Mariano was wrong about reforming Italian homes in America, or, at any rate, that he failed to count the cost.

Claro remembers being taken by her grandfather to watch the annual parade of "The Saint" in their community (the major holiday of the year in an Italian-American community). "Oh, how I wanted to be part of that parade," Claro says. "I wanted to be on that float. I dreamed about pinning bills on the Saint. But my mother was becoming an American."[42] Claro's mother cherished stories of Anglo-Saxon American girls, as the teenagers in *Umbertina* learned about America at the Saturday matinees:[43]

> She escaped from her Italian world by reading. *Rebecca of Sunnybrook Farm* became her favorite book. For long hours — after she finished helping my grandmother with younger children and the sewing homework — she would sit and read. Her

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[41] *Id.* at 22.

[42] THE DREAM BOOK: AN ANTHOLOGY OF WRITINGS BY ITALIAN AMERICAN WOMEN 79 (H. Barolini ed. 1985).

[43] *Id.* at 78.

> heroines were fair-skinned, blond-haired, blue-eyed. She could not identify with them, but their world intrigued her. She wanted to absorb the culture of these American heroines. Because her parents were not educated [in American culture] she grew up listening to Italian soap operas and being entertained at street festivals. She rebelled against this gaudy, flashy brand of entertainment. As she grew into adulthood, her childhood dreams of American respectability grew into a determination to separate her children from a culture she had learned to despise. She would never allow her children to get involved with any of the activities which were dear to her parents' hearts. Their culture, she believed, was not one to pass to a new generation.

III. Assimilation and Preservation

Similar evidence, as to both generations, is available in the lives of early Italian-American lawyers. But there is more evidence in those lives of opposite convictions, of the desire to be Italian in America, rather than, as Mariano put it, Americans of Italian extraction. Governor Alfred E. Smith said of Justice Cotillo that he was a giant, steadfast in his ideals, "which are exemplified by his relentless preaching to his fellows that America, their new home, was entitled to nothing less than a 100 per cent undivided loyalty; entitled to their spiritual fealty as well as to the fruits of their physical labor."[44] Ferber's biography of Cotillo, though, paints the picture of a young lawyer, legislator, and judge far more attached to and representative of American-born Italians, and much more at one with them in a cohesive Italian culture, in Harlem's Little Italy, than Governor Smith or Mariano allowed for.

The immigrants and young Italian-Americans of Cotillo's early practice were more often victims of American society (and sometimes of their Italian neighbors) than rebels against it:[45]

> Cotillo's activities in the courts [in his first year as a lawyer] more than ever convinced him that the body politic was too often responsible for the ills of his neighbors. Italian-Ameri-

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[44] *See* N. Ferber *supra* note 27, at vii.

[45] *Id.* at 26-27.

> cans intent on honest employment, even if only at the push-carts, were told they must pay illicit tribute to get permits. Others seeking berths in the municipal street-cleaning department were asked to pledge themselves to pay weeks and months of their earnings when appointed. Recreation pier concessions were paid for. So, too, were even permits for boot-blacks and newsstands. Each had its price. The exploiters, in the main, came from among their own. This racket system preyed on the fears and ignorance of the poor. The victims poured their troubles into the ears of Frank Cotillo and he relayed them to his son.[46]

"Certainly," Frank Cotillo said to his son, "these people ask little enough. They are eager to do the humblest work, by no means in competition with your Americans, and they are asked to pay bribes. Is it any wonder that they resist Americanization?"

"[Y]oung Cotillo set aside several hours of each day and almost all of the evenings to take up the problems of his father's friends," the biographer says. "Above all, he learned, they were puzzled. They could not understand why in this land, where freedom was presumed to await them, they should be denied the right to work. Some were subdued, broken by this interference with their making a livelihood. Others, recalcitrant, called down anathema on the heads of the politicians, officeholders and the commonwealth itself."[47] A few no doubt dealt with their persecutors as Miller's Marco dealt with his: All the law is not in a book.

Mariano's evident view of the immigrant generation was that they could not be Americanized, and therefore had to be survived. Meanwhile they had to learn to trust American legal institutions.[48] He recognized that these immigrants saved from

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[46] *Id.* at 26.

[47] *Id.* at 26-27. There is, here, a cultural difference in the view that freedom implies, or doesn't imply, access to work.

[48] *See*, COURTS *supra* note 33, at 78, 80. Mariano argued that Italian contadini were mistaken in their preference for urban life and the protection of the Little Italies; more of them should be, as they had been in the Mezzogiorno and Sicily, farmers. They would, he said, find farming in America more stable and profitable than farming in Italy had been. 85% had been farmers, or had worked on farms, in Italy; 75% had taken up urban life in this country — 50% in three or four eastern states. *Compare* S. LAGUMINA, FROM

their meager wages toward ownership of their homes and small businesses; he saw that they needed legal services to protect them as they did so. He argued that the Italian immigrants needed to be taught to trust other American institutions as well — courts, banks, land brokers. They would have to turn to these institutions, he thought, if they were to own farms, businesses, and homes.

The older generation of Italians in America, Mariano said, suffered from "indifference to our method of righting wrongs."[49] The immigrant's thoughts about American law "need guidance or they will soon lapse from mere indifference into contempt and disdain."[50] The Italian immigrant "needs to be shown that the measure of justice . . . is . . . what the public opinion of his community demands . . . . [H]e should not be allowed to drift into racial communities, forming habits of thot [sic] and ways of thinking that are limited and warped." The fact that the immigrants were law-abiding and respected legal authority (by Mariano's account) should have made it easy for assimilators "to help him adopt an attitude of mind toward our courts, both proper and sane." That this did not work out to be so easy after all was, he said, due to Italian habits of secretiveness in business and family matters; but that, too, would yield to reform. Of course, he said, "the training period for the Italian . . . should be longer than it properly is for others who have no such traditional background to overcome."[51]

Mariano's argument for reforming Italian families resembled Leonard Covello's more famous study of Italian-American school children (those in the first generation born in America). "[I]t is necessary to take into account the adverse influence of the Italian family mores upon the process of formal school edu-

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STEERAGE TO SUBURB: LONG ISLAND ITALIANS (1988). LaGumina argues that the lives of the contadini in Southern Italy were so miserable that return to agriculture in "the land of opportunity" was not likely to be attractive as a way to earn the family's living; but they were attracted, he says, to the Long Island suburbs because homes there provided light, air, and room for a family garden. The 50 suburban communities LaGumina studied are today from 25% to 50% Italian-American and retain an Italian-American cultural character.

[49] *See* COURTS *supra* note 33, at 39.

[50] *Id.* at 41-42.

[51] *Id.* at 41-42.

cation," Covello said, "[T]here is even evidence of collusion between the parents and the child in violating school attendance regulations . . . . The problem . . . would seem to suggest a need to modify Italian family mores — an undertaking which is tantamount to cultural modification . . . a substitution of American patterns for old-world patterns. . . ."[52]

Italian-Americans, when they did get into criminal trouble, Mariano said, tended to commit crimes of violence rather than crimes of stealth. Often, he said, as Miller's Mr. Alfieri would have, such incidents occurred because Italians had an emotional and pressing sense of injustice and applied the law that was not written in books. For such cases, they had to be taught respect, restraint, and patience toward the bureaucratic, laconic, mundane operation of American law enforcement and American courts. "[I]t may be said without fear of contradiction that the Italian is a peaceful, law-abiding, thrifty and home-loving citizen," he said (speaking of the immigrants, again, not of their American-born children).[53] Italians had only to learn that justice can still be justice without "long and impassioned oration" and the absence of uniforms, and can be justice despite the presence of protracted laconic arguments over the admission of evidence, "great importance . . . attributed to the taking of the oath . . . the brusqueness of the court attendants . . . but little show and no seeming authority . . . [and] an entire absence of atmosphere befitting a place where judgments deciding rights, duties, and obligations . . . are permanently passed upon."[54]

The lawyers who would help change these Italian attitudes would not at first be Italians. Italians who were qualified as lawyers in Italy, before emigration, could not function in this country as lawyers. And few Italian immigrants were able to undertake and complete law study in this country.[55] Mariano[56]

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[52] L. COVELLO, THE SOCIAL BACKGROUND OF THE ITALO-AMERICAN SCHOOL CHILD: A STUDY OF THE SOUTHERN ITALIAN FAMILY MORES AND THEIR EFFECT ON THE SCHOOL SITUATION IN AMERICA 406 (1967). Covello's conclusions have been challenged: For an example, see the discussion in T. SHAFFER, *supra* note 40.

[53] *See* COURTS, *supra* note 33, at 17.

[54] *Id.* at 40-41.

[55] A modern instance of that is the St. Louis lawyer Paul B. Rava, who came to the U.S. with his wife and children in 1940, fleeing the anti-Semitism of Nazi-controlled It-

mentions education, preparation, and cultural difficulties. He does not mention money, but money was undoubtedly a factor, along with the fact that most of the immigrants he refers to were poor Southern Italian peasants — illiterate, wary of institutions, often without training in useful trades — and pervasively discriminated against in America. In any case, there were virtually no Italian-speaking lawyers in the immigrant generation.

Salvatore A. Cotillo saw the confrontation of immigrant and American law more in terms of power and less in terms of the excellence of American institutions — and he spoke far less of the Italians coming to terms with (as Mariano put it) "our" courts and much more in the language of Southern Italian peasant wisdom.

The barrier was language, Cotillo said. Once that barrier was overcome, Italians would be capable of seeing to their own social welfare. The percentage of illiteracy, he said, was about the same on the Mayflower as it was in Harlem's Little Italy when Cotillo went to law school, but the Pilgrims were illiterate in English.[57] Beyond language, Cotillo appears to have had in mind, as relevant to Italian-American politics, the long and bitter history of the peasant village in Southern Italy and the fact that the political power of the village and of its old way, *la via vecchia*, in the extended family was its ability to draw in to itself and survive — literally and culturally — the corrupting force of powerful outsiders.

Cotillo did not emphasize being American. He emphasized voting: "Become citizens," Cotillo said, "You will then have the right to take part in the government. This is a system of self-government. You Italians, more than others, should understand this. For so long as you leave it to others you will be oppressed by these others," he said, "the longer you remain inarticulate

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aly. Mr. Rava was a lawyer and law teacher in Venice; he qualified for the bar there in 1936. In this country he found his experience and expertise "not saleable" and enrolled in Washington University Law School under a World War II program sponsored by the American Bar Association. It may be indicative of his immigrant roots that much of his practice since he was admitted in Missouri in 1942 has been in immigration law. *Judges and Lawyers: First Generation Success Stories*, THE JUDGES J. 5, 9 (1986).

[56] *See* COURTS, *supra* note 33, at 47-48.

[57] *See* N. FERBER, *supra* note 27, at 27.

and inactive, by so much longer will you be looked upon as not merely alien in blood and temperament, but in thought and moral philosophy. You will be looked upon as outlaws. Do not delay, for the longer you are held in low esteem, so much the longer will it require to establish yourself as worthy citizens in the eyes of those who today look down on you."[58]

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Covello's study of Italian-American school children argued, as Marino had, that the confusion of being in the first generation born in America led to moral breakdown: "Weakened social controls within the family and the local community have contributed to the development of attitudes ranging from disobedience to defiance of all adult authority," Covello said. "The decline of family authority has engendered, on the part of the younger generation, a feeling of superiority to parents who are poor, socially handicapped in language, manners, or dress, and who are therefore considered alien to a complex social environment. The younger Italo-American is often ashamed of his parents."[59]

Helen Barolini's literary and biographical evidence supports Covello's perception of cultural confusion, but neither those sources of insight, nor the implications of Cotillo's law practice in Little Italy, supports the argument Covello and Mariano make that there was a breakdown in respect for parental authority. For one thing, neither Covello nor Mariano distinguishes between defiance parents approved of and even encouraged — truancy for example, in Covello's account — and defiance of the values of *la via vecchia*. Both leave out of account the belief among Italian-Americans that education deeply conceived — as moral formation — was the province of the family, not of the government. Neither gives sufficient respect to *l'ordine della famiglia* as having the cultural survival value in America that it had in Southern Italy. Both make the assimilator's mistake: They want the vulnerable culture to conform without being val-

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[58] *Id.*; *see also* T. Henderson, *supra* note 27.

[59] *See supra* note 52, at 416.

ued. They want to settle for individual rights.

Fran Claro's mother yearned to separate herself from her immigrant parents, but she did not; her father was there to take his granddaughter to the *festa* parade. She yearned as well to renounce homespun Italian entertainment, but she did not; her defiance amounted to finding a corner where she could read *Rebecca* and rebel quietly.[60] The distinction is subtle but important, because continuing connections with Italian culture in Fran Claro's mother's generation (as in the first, second, and third American-born generations in *Umbertina*) is what made it possible in the next generation, and the one after it, for Italian-Americans to begin to learn to appreciate and acknowledge their heritage. Modern Italian-Americans owe that opportunity to the fact that their grandparents ignored Mariano's argument and listened to Cotillo's.

IV. Early Italian-American Lawyers

There were Italian-American lawyers in the generation that grew up in the 1920s. Mariano says they were frequently scoundrels. The Italian-American lawyer who was honest and apparently not well assimilated had no experience beyond the workmen's compensation system, minor courts in the civil system, and criminal law.[61] In his 1925 book, Mariano counted three hundred Italian-American law students in New York City and estimated that ten years earlier there had been as few as fifty. The Italian population of New York City was 750,000 when he wrote and there were not "even one thousand lawyers of Italian parentage" in the city.[62]

Whether the American legal system was as benign and nurturing as Mariano said, or as power-driven as Cotillo expected it to be, Italian-American lawyers should have been in a position to mediate between the dominant American culture and the children of the Italian immigrants. Mariano thought Italian distrust of American law got in the way of what Italian-American lawyers were able to do. Italians often let their legal rights go

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[60] *See supra* note 43.

[61] In contrast, he says, to Jewish lawyers. *See* Courts, *supra* note 43, at 46.

[62] *Id.* at 63. He counted 900. *Id.* at 44, 63.

unvindicated "for fear of falling into the hands of unscrupulous attorneys," he said,[63] because "in the past . . . the illiterate were easy prey for their unscrupulous fellow Italians."[64] He does not mention — as other descriptions of this immigrant society often do — the possibility that the Italian-American lawyer, who had gone out from the community to study English common law, in English, with Anglo-Saxon, Protestant Americans, was seen as a threat to *la via vecchia*, and distrusted for that reason — not because he was either simple-minded or a swindler, but because he proposed the corruption of *l'ordine della famiglia*.[65] Fiorello LaGuardia is an example: Many — in some elections more than half — of the Italian-Americans in New York City voted for LaGuardia's opponents. His personal life (he had married a non-Italian, who was not a Catholic) and his political program threatened *la via vecchia*; it did not matter enough that he was an Italian-American. Ethnic loyalty was not what was at stake; the preservation of culture was at stake.[66] The possibilities Mariano neglected were that Americanizers were distrusted and the Italian-Americans in law practice were seen as Americanizers.

Mariano says another reason Southern Italians and their children did not go to Italian-American lawyers was that they did not like to give personal information to anybody they knew, and did not trust professional assurances of confidentiality. He may have been closer to the real reason when he hinted that the immigrants and their children did not believe, as Mariano did, that the Italian-speaking lawyer was "a power for untold good among his people . . . the one person who by training and by experience is best fitted to interpret his people to others . . . their best *public* interpreter."[67] The suggestion we construct here is that an Italian-American lawyer had to demonstrate that he was not an assimilator. He had the burden of proof, and he

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[63] *Id.* at 39, 53.

[64] *Id.* at 45.

[65] *E.g.* J. BARTON, PEASANTS AND STRANGERS: ITALIANS, RUMANIANS, AND SLOVAKS IN AN AMERICAN CITY, 1890-1950 (1950) at 156-58.

[66] R. GAMBINO, BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN AMERICANS 297 (1974).

[67] *See* COURTS, *supra* note 33, at 50.

sometimes failed to meet it to the satisfaction of the wary Southern Italians Mariano wanted him to assimilate.

Mariano had hope for the future, hope for Italian-American lawyers as they became more numerous and experienced. But the hope he had was for an assimilated Italian citizenry — assimilated in significant part by the efforts of Italian-American lawyers. These lawyers would themselves come from assimilated Italian families, he said, "along the same lines as . . . among the members of other racial groups . . . who are older here in point of time."[68] These lawyers would teach their Italian neighbor that "the laws of this land are made for his good . . . and that there is usually sound reason for many of the laws and prohibitions that face the bewildered newcomer."[69] He said the task of the Italian-American lawyer was the task "of Americanizing the Italian," teaching him to esteem the stars and stripes rather than "the Flag of the House of Savoy."[70] This change in flags would give Italian-Americans an understanding of spiritual and economic opportunity in America, and a common language, Mariano said, developing among Italians "American nationalism in times of peace as well as in times of war . . . patriotism and loyalty to American tradition . . . the elimination of race hatreds . . . an American standard of living . . . [and] the full and free emancipation of the Italian women."[71]

V. Cotillo as a Preserver

Salvatore A. Cotillo's life as a young lawyer in Harlem's Little Italy was more clearly an Italian experience than the life of the Americanized Italian lawyer as Mariano visualized it, although in some ways what Cotillo did for his Italian clients was

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[68] *Id.* at 49.

[69] *Id.* at 55.

[70] *Id.* at 73. As if a Southern Italian would have had esteem for the flag of the House of Savoy!

[71] *See* Courts *supra* note 33, at 73-74. V. D'Andrea, *The Social Role Identity of Italian-American Women: An Analysis and Comparison of Familial and Religious Expectations*," in The Family and Community Life of Italian Americans 61 (R. Juliani ed. 1983), argues that the immigrant Italian married woman was better off, economically and spiritually, under *l'ordine della famiglia* than her counterparts in families in the dominant American and Irish-American cultures were.

what a lawyer would have done for them in his native Naples. He was a legal counselor in his neighborhood,[72] but he was also, in those years, attorney for the Bank of Naples and Consul General in New York City for the government of Italy. During World War I, when he was within the first five years of his practice, he lived in Italy and there represented the American Bureau of Public Information.[73]

Cotillo also exhibited the professional rectitude Mariano hoped for in the new generation of American-born, Italian-American lawyers. For example there were unscrupulous Italians in Cotillo's neighborhood — notably bankers, steamship-ticket sellers, and thugs. One Giosue Gallucci met American law with bribery and violence. He boasted that he could "fix" things with the police and gain advantage through force and intimidation where Cotillo sought advantage, then and later, through compromise and political competence.[74]

> Gallucci boasted that murder could be bought and paid for. Stories were circulated that he caused witnesses to disappear, that an unwanted wife could be loaded upon a boat, given some money, and shanghaied back to "the old country." Gallucci was arrested for carrying concealed weapons, and Cotillo was asked to testify on his behalf as a character witness. He refused, making palpable the breach between himself and the district's underworld. After Cotillo was admitted to the Bar, he refused, despite the tender of attractive fees, to help men of Gallucci's character secure pistol permits and the break flared into open hostility.

Gallucci was later killed by another gangster (which is no more a vindication of American law than it is of Gallucci's way of dealing with American law).

Cotillo dealt with employment and family situations, with the same swindlers and the same bias and weakness in the law.[75] He functioned as listener and guide in a way that was more like

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[72] *See* N. FERBER *supra* note 27, at 19.

[73] Cotillo's book about Italy, *supra* note 27, was based on his experiences during those war years in Italy.

[74] *See* FERBER, *supra* note 27, at 20.

[75] *Id.* at 21.

the lives of nineteenth-century American "republican" lawyers than the lives of lawyers in Southern Italy:[76]

> Coming home at night Cotillo often found groups of young people on the front stoop. They had gathered for what they knew would prove an interesting and inspiring talk. Before he went in for dinner, Sal spoke to them. There were discussions about every conceivable topic, but dominating everything that Cotillo had to say was his conviction that the new Italian element in American life ought to command an important role in the process and drama of government. This role, he told his listeners, could begin in their own neighborhood.

Ferber's biography of Cotillo also describes in Cotillo's early law practice a lot of uncompensated charity for neighbors. But it is evident in Ferber's description that Cotillo was building alliances, from his earliest days as a lawyer, that would make it possible for him to use un-Americanized, Italian-voter power as his Irish elders in New York and Boston were using the power of other immigrant groups.

Cotillo's opinion of American jurisprudence was far different from Mariano's. He saw that American law was flawed, and particularly so as it was imposed on immigrants and their children. His early career went well beyond what Mariano described. He used political means to preserve Italian culture where Mariano would have used professional influence to turn the immigrants into melting-pot Americans. He went from his law practice to be the first Italian-American assemblyman, thence to become the first Italian-American senator, in the New York legislature — and in both houses his principal activity was the development and passage of social-welfare legislation. He was later the first Italian-American appointed to the Supreme Court (trial) bench in New York. Governor Smith said Cotillo served as a judge with "mellowness of spirit" and "the same interest and activity which influenced his early work in the Legislature."[77]

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[76] *Id. See* R. CAPORALE, THE VALUE SYSTEM OF SOUTHERN ITALIAN-AMERICAN PROFESSIONALS: A COMPARATIVE PROFILE, in ITALIAN AMERICANS IN THE PROFESSIONS 275 (R. Pane ed. 1983).

[77] *See* N. FERBER, *supra* note 27, at vii.

Cotillo's biographer, who, I think, missed the point, celebrated Cotillo's judicial qualities with a quotation from Shakespeare. He might better have used Dante — or even Machiavelli: Cotillo's position within Little Italy was an Italian position, most particularly in his insistence that Italians in America would not be able to take advantage of American opportunity unless they did so with political power, and in his courageous resistance to the darker elements in Little Italy's culture. An example on both points involves his early encounter, as a beginning lawyer, with another gangster:[78]

> He was retained to defend a man involved in a sex crime. The next day he was waited upon by the local Camorra leader — son of a Camorraist notorious in the old country. This fellow blandly announced that he would arrange Counsellor Cotillo's fee in the case; that henceforth all defense arrangements for persons arrested for crime would be handled by the Camorra leader or his lieutenants, and that the young attorney must govern his conduct and regulate his fees by his dictation. By way of mitigating his effrontery, the Camorraist assured Cotillo that if he fell in with this plan, his speedy financial independence was assured; but that, on the other hand, if he did not, great harm would come not only to him but to his family as well. In response, Cotillo, young, idealistic and with his recent quaffing at the cup of legal ethics pounding righteously in his bosom, rose to daring and dramatic heights. He replied that his law practice was his own; that he would look for guidance only to the courts and the tenets of the Bar Association; that the Camorra might know once and for all that he did not intend to be coerced or intimated. He ordered the man from his office. The enraged Camorraist lifted his cane and this struck Sal as funny. Though the moment had been tense, he smiled. The mobster was puzzled by the smile. It unnerved him. He hesitated. Men threatened by him did not smile. In that fleeting moment Cotillo recalled that a useless antique gun lay in his desk. It had been given him as a harmless toy . . . by his grandfather. Cotillo reached into a drawer, withdrew the pistol and leveled it at the bandit . . . . The terror-dealing Camorraist lost his nerve . . . shrieked in fear . . . Cotillo booted him

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[78] *Id.* at 23-24.

out of his office . . . .

News of how young Catillo had dealt with the much-feared "bad man" spread rapidly among the Italians of the city. The better element, enormously in the majority, applauded his courage. He became their champion; and was from that day feared and avoided by the underworld.

VI. Conclusion

The significant contrast between the Italian-American lawyer Mariano envisionsed and hoped for, and the Italian-American lawyer Cotillo typified, is an earthy appreciation for the uses of power. It is, as the biographer says, ethics — but the ethics has more of Italy in it than of the vaporous and contemporary rhetoric of the Bar Association of the City of New York. The antique pistol Cotillo kept in his law office was not, after all, a toy; it was the effective device of a wily, resourceful young lawyer, who — as is often the case with lawyers — found out how to use power he did not have.

Cotillo knew that American legal institutions were *not* excellent and that native Italian disgust for hypocrisy would make it impossible for Italians to trust them. But, whether the institutions remained as they were or became — not excellent, but useful — the key to justice for Italians was to use these institutions and with them gain political power.[79] Cotillo was a co-founder, with his father, of an Italian-American political club called the Tomahawk Democratic Club. The Cotillos and their club took on the Hayes Machine in 1911. The club got beat in the electoral contest, but Cotillo made a deal with Hayes that gave Little Italy a political foothold in the city.[80] The Italian community later brought as much pressure as it had to bear on Hayes, and Hayes and his machine put Cotillo in the legislature.

"I want to help my people," Salvatore A. Cotillo said, "and can do so only with the backing of those in power."[81] It is indicative of the arguments Cotillo made when he spoke in Little Italy

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[79] T. Henderson, *supra* note 27, describes this political activity and relates it to later developments in Italian-American influence in American politics. Justice Cotillo remained interested in Democratic politics until his death in 1939.

[80] *Id.* at 84.

[81] *See* N. Ferber, *supra* note 28-29.

that he, alone among the speakers who attacked Hayes in 1911, was left alone by Hayes's goons. He was as bold with his voice and (very local) influence as he had been with his grandfather's antique pistol:[82]

> [I]t was on the stump that [the club] encountered all their difficulties. For no sooner did they mount the tailboard of a truck at some street corner than they were stoned and thrown off. The only one immune from such treatment was the popular young Cotillo. Throwing stones or offering violence to one of their own — an Italian — particularly this popular son of a popular father, was taboo. Even the fiery Hayes took heed of this viewpoint of his Italian constituents and ordered that young Cotillo should not be molested when making a speech, regardless how bitter his attack, even on Hayes himself. Cotillo thus became the lone champion of his group, fighting single-handed against an array of Tammany orators long schooled in their work.

Italian culture in America has survived longer than Mariano thought it would. It has survived long enough to be valued by the dominant culture, even to be learned from. We think it will probably survive as a permanent influence on the practice of law in America, as well as on American politics. There is evidence of influence in the daily newspapers: one of the country's most prominent and popular governors;[83] its first female candidate for national office;[84] many judges, mayors, legislators, and presidential advisors;[85] and the first Italian-American on the bench of

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[82] *Id.*

[83] DIARIES OF MARIO M. CUOMO: THE CAMPAIGN FOR GOVERNOR (1984); *see* H. Boyte, *The Politics of Community*, THE NATION, Jan. 12, 1985, p. 12.

[84] *The Making of a Trailblazer*, People, July 30, 1984, p. 24; A. Hughes and F. LaVeness, *Congresswoman Geraldine A. Ferraro: An American Legacy*, in A. LAVENESS AND J. SWEENEY, WOMEN LEADERS IN CONTEMPORARY U.S. POLITICS 35 (1987); G. FERRARO, MY STORY (1985); *see* W. Schneider, *The New Shape of American Politics*, The Atlantic Monthly, January, 1987, p. 39.

[85] S. Hall, *Italian-Americans: Coming Into Their Own*, The New York Times Magazine, May 15, 1983, p. 28; A. Parker, *Not Only a Great Man, But a Decent Man*, Trial, February 1986, p. 11 (on Peter W. Rodino, Jr.); S. LaGumina, *John Pastore, Italian-American Political Pioneer*, and J. Paolini, Jr., *An American Italian: The Life and Times of Luigi DePasquale (1892-1958)*, both in THE MELTING POT AND BEYOND: ITALIAN AMERICANS IN THE YEAR 2000 1, 15 (J. Krase & W. Egelman eds. 1987); R. Angell, *The Sporting Scene*, The New Yorker, Aug. 22, 1988, p. 50 (on A. Bartlett Giamatti, the

the United States Supreme Court[86] — all of these national leaders are lawyers and all are visible and openly within their Italian culture. They are Italian Americans. In some ways, they are, as their immigrant ancestors were, Italians in America. Their argument — and ours — is that being Italian in America is a good thing for them, for other Italian Americans, and for the country. They have something worth preserving.[87]

Commissioner of Baseball); J. BRIGGS, AN ITALIAN PASSAGE: IMMIGRANTS TO THREE AMERICAN CITIES 1890-1930 169-70 (1978) (on lawyers); G. QUILICI, THE ITALIAN AMERICAN LAWYERS OF CHICAGO (1968).

[86] *The Supreme Court with a Smile*, U.S. News and World Report, Jan. 12, 1987, p. 23; *New Kid on the Block*, A.B.A. Journal Aug. 1, 1986, p. 20; S. Adler, *Live Wire on the Circuit*, The American Lawyer, March, 1985, p. 86; R. Nagareda, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. (1987).

[87] We are grateful for the assistance of Linda Harrington, Kenneth Kinslow, Peter Noone, Robert S. Redmount, Nancy J. Shaffer, and Michael J. Slinger.

THE APPELLATE LAWYER'S ROLE IN THE CASELOAD CRISIS

*Michael Vitiello**

The topics of caseload and case management now dominate discussion about federal courts.[1] Indeed, many recent Supreme Court decisions reflect the Court's concern with an overcrowded docket.[2] As a result, the Supreme Court[3] and many commentators[4] have looked favorably on alternative dispute resolution proposals as a means of lightening the caseload.

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[1] *See generally* P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL, 1-11, 121-230 (1976)(general discussion of problems in appeals process resulting from increased caseload); Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 603-25 (1985)(discussion of effect of heavy caseload on doctrine limiting access to adjudication); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 474-448 (1982)(general discussion of evolving judicial role as response to caseload difficulties); Hoffman, *The Bureaucratic Spectra: Newest Challenge to the Courts*, 66 JUDICATURE 60, 60-72 (1982)(discussion of judge's administrative responsibilities).

[2] *See, e.g.*, Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 334-35 (1985)(upholding statute limiting attorneys' fees to $10.00 in cases before Veteran's Administration); Marek v. Chesnyk, 473 U.S. 1, 11-12 (1985)(applying FED. R. CIV. P. 68 to attorneys' fees under 42 U.S.C. § 1988, thereby increasing incentive to settle civil rights cases).

[3] *See, e.g.*, Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2344-46 (1987)(holding "RICO" statute not punitive in nature, therefore, civil RICO claim not precluded from resolution by arbitration); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 850, 587-58 (1986)(upholding constitutionality of agency proceedings, emphasizing interest in inexpensive, expeditious alternative to litigation); Thomas v. Union Carbide Agricultural Products, 473 U.S. 568, 593-94 (1985)(upholding as constitutional statute requiring binding arbitration in cases arising under FIFRA).

[4] *See generally*, Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253-277 (1985)(purposes use of case management techniques encouraging alternative dispute resolution); Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643-59 (1985)(general discussion of caseload crisis on quality of litigation process).

Moreover, many federal judges have added their voices to the debate over the so-called "caseload crisis" and the various remedies proposed.[5] To be sure, the caseload affects these judges most directly; it determines both the pace of their work and their perception of the job itself. Many of them lament the passing of an era as recent as twenty years ago when federal courts of appeals were collegial places where appellate judges had ample time to deliberate on the cases before them.[6] Moreover, it can probably be said without dissent that the overloaded federal court system also creates serious problems for litigants, lawyers and the courts. A heavy caseload can slow the decision making process to an unacceptable level, and yet efforts to keep pace to avoid delayed justice may produce unjust results. For instance, hasty deliberation may produce inconsistent decisions within a federal circuit, while this same caseload pressure reduces *en banc* review, preventing correction of those inconsistent decisions.[7]

However, proposed solutions to this caseload problem are fraught with difficulties. For example, creating new judgeships would have definite disadvantages, even if that course were politically and economically feasible.[8] Furthermore, although liberal Warren Court doctrine unquestionably contributed to the dramatic increase in the volume of litigation in the 1960s,[9] the

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[5] AM. J. TRIAL ADVOC., 63, 63-80 (1981)(discussion of mechanics of appellate process); Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 N.D. LAWYER, 648, 648-59 (1980)(general discussion of caseload increase in federal courts); Higginbotham, *Bureaucracy — The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 261-72 (1980)(general discussion of problems caused by heavy caseload). *See also, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 21-23 (prepared statement of Chief Judge James P. Coleman, U.S. Court of Appeals, Fifth Circuit).

[6] *See, e.g.*, Rubin, *supra* note 5, at 648 (noting that author once felt federal judges were "magisterial if not regal").

[7] *See infra* notes 37-43 and accompanying text.

[8] *See, e.g., Proceedings of the Forty-Seventh Annual Judicial Conference of the District of Columbia Circuit*, 114 F.R.D. 419, 546-48 (1986) [hereinafter *Proceedings*] (comments of Ms. Knab, suggesting that large federal deficit makes new judgeships improbable). Apart from the deficit, one must recognize that as long as the Democratic Party controls Congress and a Republican is President, Congress may not be motivated to afford the President the opportunity to annoint a large number of lifetime appointees.

[9] *See* Howard, *Our Litigious Society*, 38 S.C. L. REV. 365, 369-70 (1987)(Warren

volume of federal litigation nonetheless has continued to increase throughout the 1970s and 1980s even as the Burger and Rehnquist courts have eroded those same liberal precedents.[10] Congress also is responsible for a large part of the increased caseload because over the years it created a host of new federal rights without regard to the impact on the judiciary.[11] Thus, it is difficult to even isolate the cause or causes of the burgeoning federal docket.

In any event, prominent commentators have reacted to the perceived crisis and advocated significant curtailment of federal court jurisdiction. For example, Chief Justice Rehnquist has advocated abolition of the appeal of right to the federal courts of appeals.[12] Other observers have suggested elimination of federal court jurisdiction altogether in specific classes of cases.[13] To be sure, some of the suggested remedies are politically neutral; for example, when a commentator suggests elimination of diversity jurisdiction, one does not suspect a hidden political agenda.[14]

Court activism helped create litigation explosion). Examples of Warren Court cases which increased litigation in federal court are numerous. *See, e.g.*, Malloy v. Hogan, 378 U.S., 1, 8-9 (1964)(applying fifth amendment's privilege against self-incrimination to states through fourteenth amendment); Fay v. Noia, 372 U.S. 391 *passim* (1963)(expanding general range of cases cognizable in habeas corpus proceedings); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)(applying fourth amendment's exclusionary rule to states through fourteenth amendment).

[10] *See, e.g.*, United States v. Frady, 456 U.S. 152, 167-69 (1982)(applying strict cause and prejudice standards to procedural default by federal prisoner in § 2255 proceeding); Sumner v. Mata, 449 U.S. 539, 547-49 (1981)(strengthening presumption of correctness given to state court fact finding in habeas proceedings); Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977)(enforcing strict procedural default standard in § 2254 proceedings); Stone v. Powell, 428 U.S. 465, 492-94 (1976)(holding state prisoner's claimed fourth amendment violation beyond review in habeas proceeding where prisoner had full and fair opportunity to litigate question in state court). Professor Howard suggests that the Burger Court has opened up new areas of litigation. Howard, *supra* note 9, at 370.

[11] Rubin, *supra* note 5 at 657-58. *See* Howard, *supra* note 9, at 370 (cites various rights expanded by Burger Court including abortion and commercial speech).

[12] Address by Justice William Rehnquist at the 75th Anniversary of the University of Florida College of Law and the Dedication of Bruton-Greer Hall (Sept. 15, 1984).

[13] *See* Rubin, *supra* note 5, at 658 (suggested elimination of federal diversity jurisdiction).

[14] *Id. See also*, C. WRIGHT, LAW OF FEDERAL COURTS, § 23, at 127-37 (4th ed. 1983) (discussing arguments for and against general diversity jurisdiction). *Id.* at 164 (discussing change in reputation of federal courts as pro-business); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 334 (1977) (56% of lower federal judges favored elimination of diversity jurisdiction).

However, such neutrality is not the case when, for example, Judge Richard Posner calls for judicial restraint and for renunciation of habeas corpus jurisdiction as he does in his provocative book, *The Federal Courts: Crisis and Reform.*[15] Hence, this article attempts to discuss and evaluate the merits of these diverse approaches to the caseload problem. In the end, however, I assert that courts and commentators should focus their attention on the lawyers who argue in the appellate courts. Indeed, only when the deficiencies and laxness of many appellate lawyers are identified and addressed will there be any real hope of significant improvement in the federal appeals dockets.

This article operates on the premise that access to the federal courts is one of the finest traditions in our governmental system. Unquestionably, Article III courts have been instrumental in securing individual rights.[16] Thus, even if flawed, the independent federal judiciary works well.[17] So too does the appellate process where oral argument gives litigants direct access to the decision makers and where written opinions compel the decision makers to justify their decisions.[18] Because of the value of this

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[15] R. POSNER, THE FEDERAL COURTS: CRISES AND REFORM 186-88, 220-22 (1985).

[16] *See, e.g.*, Plyer v. Doe, 457 U.S. 202, 230 (1982) (upholding illegal alien's right to public education); Roe v. Wade, 410 U.S. 113, 152-54, 166 (1973) (upholding woman's right to privacy, encompassing right to terminate pregnancy); Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (establishing indigent's right to free access to state court to procure a divorce); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (upholding individual's right to possess obscene material in his home); Loving v. Virginia, 338 U.S. 1, 12 (1967) (holding Virginia anti-miscegenation law unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (guaranteeing married couple's right to privacy); Brown v. Board of Education, 349 U.S. 294, 300 (1955) *enforcing* 347 U.S. 483, 493-94 (1954) (holding segregated schools violative of equal protection).

[17] Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 581 (1985). Article III's guarantee of life tenure and protection against diminished compensation may not guarantee independent decision making by all federal judges. Such a system affords greater incentive for independent judgment than does a system where judges must run for re-election. *Id.* For discussion of some specific instances where federal judges have enforced decisions in the face of public outrage, *see* P. COOPER, HARD JUDICIAL CHOICES 12 (1988) *passim* (discussion of numerous cases decided contrary to public opinion). *See also* Resnik, *supra*, at 581 n. 1 (comparing "extraordinary luxuries" in Article III with political pressure brought to bear against former California Chief Justice Bird).

[18] R ALDISERT, THE JUDICIAL PROCESS § 1 at 14 (1976). As any reader is aware, law professors and other legal writers subject judicial decisions to agonizing and critical scrutiny, and some judges have viewed traditional scholarship as helpful in their job. *See,*

open access to federal courts, curtailment of jurisdiction or the elimination of the right of appeal ought to be a remedy of last resort.

In this article, I examine some of the effects of the increased caseload on the federal appellate courts.[19] I then examine both Chief Justice Rehnquist's and Judge Posner's proposals to limit access to the federal courts. In the end, I conclude that both proposals are inappropriate.[20] Instead, I suggest that rather than impairing a system which reflects important values, we ought to examine ways in which better advocacy can improve the appellate process.[21]

I. The Collegial Judiciary

A number of commentators have decried the transformation of the federal judiciary in the past twenty years.[22] Specifically, they bemoan the way in which the appeals courts have proliferated in response to the enormous increase in the appellate caseload. In their view, this development has transformed the role of the appellate judge "[f]rom collegial arbiter and solitary craftsman" to "the equivalent of the managing partner of a small law firm."[23] This new role for the judge raises concerns about the adequacy of the court's decision making capacity.

The collegial federal judiciary is often identified with the work of the Second Circuit during Judge Learned Hand's celebrated tenure on that court. As described by Judge Alvin Rubin, "Circuit judges [in those days] . . . sat in stately triumvirates and, after listening to the oratory of argument, retired to their

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e.g., Richardson, *Law Reviews and the Courts*, 5 Whittier L. Rev. 385, 389-90 (1983)(discussion of role of law students and faculty in shaping the direction of jurisprudence); B. Cardozo, Introduction to Selected Readings on the Law of Contracts at vii, ix (1931).

[19] *See infra* notes 22-43 and accompanying text.

[20] *See infra* notes 44-236 and accompanying text.

[21] *See infra* notes 237-88 and accompanying text.

[22] *See, e.g.*, P. Carrington, D. Meador & M. Rosenburg, *supra* note 1, at 4-12 (explaining that performance in American appellate systems is threatened by increase in workload); *see generally*, Hoffman, *supra* note 1 (arguing that increase of workload is converting judiciary into bureaucracy); Rubin, *supra* note 5 (discussing effect of increased work load on court system).

[23] Hoffman, *supra* note 1, at 63.

chambers where, in coat and vest, they studied law books and whence they issued opinions in phrases redolent, if not equal to, those of Learned Hand and Benjamin Cardozo."[24]

Perhaps still a reality within the First Circuit,[25] the ideal model of the appellate court involved "intimacy, continuity and dynamism in relations among judges . . . ."[26] Simply stated, a small number of judges within the same courthouse were able to "interact with each other, influence each other, and have each other in mind almost from the time they first read briefs for the next session of court."[27]

However, the dramatic increase in the appellate workload between 1940 and the present has changed the way appellate judges perceive their jobs.[28] While the number of judgeships has proliferated, judges have still not kept abreast with the caseload.[29] Thus, judges today must decide more cases than their predecessors. Furthermore, contemporary adjudication is far more complex than in the past and requires more time for adequate deliberation.[30] Unfortunately, all of these factors dilute collegial decision making. For example, the Ninth Circuit has

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[24] Rubin, *supra* note 5, at 648; *see also* SCHICK, LEARNED HAND'S COURT (1970) (studying federal courts of appeal and recognizing that most of their work goes unappreciated); Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 665 (1957)(introduction to subsequent article by late Judge Frank discussing Second Circuit Court of Appeals when Judge Learned Hand was senior member and Judge Frank was junior member).

[25] The First Circuit has only six circuit judges. 840 F.2d viii. For a personal account of the work style of one of those judges, *see* Coffin, THE WAYS OF A JUDGE (1980).

[26] Coffin, *supra* note 25, at 58.

[27] *Id.*

[28] *See, e.g.*, Rubin, *supra* note 5, at 657. (desirability of being federal judge is inversely proportionate to number of routine cases brought to federal court). Circuit Judge (then District Judge) Higginbotham has argued that the quality of federal judges is diminished by the increased caseload and by the trivial nature of some disputes now within federal court jurisdiction. Higginbotham, *supra* note 5, at 261-72; *see also* H. FRIENDLY, FEDERAL JURISDICTION 28-30 (1973)(providing general view of federal jurisdiction); King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 120 (1983)(discussing effect of *Northern Pipeline* which held that 28 U.S.C. § 1471 was unconstitutional because it authorized overbroad jurisdiction in allowing bankruptcy courts to adjudicate all matters related to cases arising under Title 11 of the Bankruptcy Code).

[29] Hoffman, *supra* note 1, at 63; Rubin, *supra* note 5, at 650-51.

[30] Hoffman, *supra* note 1, at 63; Rubin, *supra* note 5, at 649.

twenty-eight circuit judges.[31] The circuit covers nine states and thousands of miles.[32] Thus, size makes collegiality impossible because one judge among twenty-eight will sit infrequently with another judge. Similarly, especially where a circuit includes judges appointed by presidents with philosophies as diverse as John Kennedy and Ronald Reagan, conflicts within the circuit are inevitable,[33] but "[a]s the need for *en banc* review grows, . . . the ability of the enlarged courts to harmonize opinions falls inversely."[34]

Although difficult to quantify, the caseload pressure and resultant time constraints and loss of congeniality affect the quality of the judiciary's work product. As argued by Judge Rubin, ". . . courts . . . are unable to cope with the torrent of cases without resorting to measures adopted primarily as time savers."[35] Such measures include abandoning oral argument and a formal written opinion in many cases.[36] Consequently, as "[m]ore conflicting opinions are rendered, the law becomes less predictable and less effective as a guide to behavior."[37]

Judges admit that much of the work of judging must be delegated to law clerks. To handle the volume of work, judges are sharing the task of actual decision making with their clerks. Current law clerks, "among the brightest and ablest graduates of our law schools, are not merely shelving books and running citations in Shepard's. They are in many situations parajudges."[38]

Eventually, transferring too much responsibility to recent law school graduates results in less informed decisions.[39] Indeed

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[31] Wasby, *Technology and Communication in a Federal Court: The Ninth Circuit*, 28 SANTA CLARA L. REV. 1, 3 (1988).

[32] Hoffman, *supra* note 1, at 62.

[33] For example, Judge James Browning was appointed on September 18, 1961 by President Kennedy; Judge Edward Leavy was appointed on March 2, 1987 by President Reagan. 840 F.2d at 23.

[34] Hoffman, *supra* note 1, at 62.

[35] Rubin, *supra* note 5, at 650.

[36] *Id.*; *see also* Hoffman, *supra* note 1, at 64 (finding that as workload of courts grow, procedural streamlining has increased and court processes have grown more formalized); Clerk's Annual Report, JUDICIAL WORKLOAD STATISTICS, United States Court of Appeals for the Fifth Circuit (July 1986-June 1987 at i (providing official statistics).

[37] *Id.*

[38] *Id.* at 653.

[39] *Id.*

law clerks have less practical experience than judges, and thus, their decisions may be more logical than wise. Greater delegation of responsibility to law clerks also undermines the public perception that judges judge. It erodes the constitutional scheme whereby the President, with advice and consent of the Senate, appoints independent Article III judges to decide cases.[40]

In short, the caseload has transformed the federal appellate judge from a reflective decision maker to a bureaucrat.[41] Quality suffers because the judge must delegate responsibility.[42] Some commentators have suggested that quality also suffers because, as the job becomes increasingly bureaucratic, it attracts less qualified candidates.[43] In addition, the caseload pressure itself impairs the quality of a court's work. Almost without exception, federal judges admit the strain brought on by the caseload. A problem exists. Conceding that, I am dubious about some of the proposed remedies to the problem.

II. Denial of Appeal of Right

Chief Justice Rehnquist,[44] among others,[45] has suggested elimination of the appeal of right to a federal court of appeals, a right in place in this country for almost a hundred years.[46] Such a proposal raises serious questions. First, while the Chief Justice

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[40] *Id.* at 655.

[41] Hoffman, *supra* note 1, at 62-63.

[42] Rubin, *supra* note 5, at 652-53; Wasby, *supra* note 31, at 1.

[43] *See, e.g.*, H. Friendly, *supra* note 28, at 28-30 (asserting that increase in number of judges makes judgeships less prestigious and thus increase in number of judges could result in deterioration of quality of judges); Higginbotham, *supra* note 5, at 271-72 (author fearful of less qualified judiciary).

[44] Rehnquist, *supra* note 12, at 22.

[45] *See, e.g.*, Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62, 107 (1985)(concluding that appeal of right presumptively should be eliminated in view of extent to which it promotes error correction, procedural fairness, and/or process satisfaction); Lay, *A Proposal for Discretionary Review in Federal Courts of Appeal*, 34 Sw. L.J. 1151, 1155 (1981)(finding that in many appeals, only an appearance of justice results due to the large number of cases and suggesting that courts of appeal should be allowed discretionary leave to deny review); Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 Geo. L.J. 417, 419 (1968)(generally discussing usefulness of civil appeals in light of increased number of cases).

[46] *See* Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C.L. Rev. 411, 412-17 (1987)(discussing early legislation creating right of appeal).

has asserted that "we have an obsessive concern that the result reached in a particular case be the right one,"[47] characterizing the concern as obsessive as a smoke screen. An appellate system designed to reduce the risk of arbitrary decisionmaking is a goal worthy of support. As an ideal, appellate adjudication gives the trial court incentive to uphold ideals of fairness and equality. Reversal on appeal may not be a severe sanction, but the possibility of review unquestionably gives a trial judge incentive to conform his conduct with the law. In essence, trial judges are more reflective because appellate review is possible.[48]

Second, while some of us may be obsessed with right results, the Chief Justice misleads his audience when he suggests that the appellate courts impose consistent standards of "right" results. Indeed, appellate courts may not have enough power to review results to assure better fact finding. In many instances, results reached below are beyond meaningful appellate review. For instance, while jury decisions have traditionally been subject to limited review, the Supreme Court has restricted the appellate courts' power to review lower court fact finding in discrimination cases.[49] In addition, at least since *Stone v. Powell*,[50] the Supreme Court has steadily eroded the role of federal courts in assuring "right" results in habeas corpus cases.[51] Thus, inconsis-

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[47] Rehnquist, *supra* note 12, at 9.

[48] Carrington, *supra* note 46, at 431; *see generally*, R. Leflar, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 4, 9-10 (1976)(explaining that appellate function is to rectify trial court errors but recognizing that hasty decision of appeals provides less assurance that parties will receive justice); P. CARRINGTON, D. MEADOR, & M. ROSENBURG, *supra* note 1, at 2-4 (asserting that quality of appellate decision is threatened by overwhelming caseload).

[49] *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 285-90 (1982)(holding that court of appeals may only reverse district court's finding of fact on discriminatory intent if it concludes that finding is clearly erroneous).

[50] 428 U.S. 465 (1976).

[51] *See, e.g.*, Teague v. Lane, 109 S. Ct. 1060, 1069-1072 (1989)(overruling *Linkletter* severely limiting retroactive application of new Supreme Court decisions); United States & Frady, 456 U.S. 152, 175 (1982)(prisoner launched collateral attack against conviction due to erroneous jury instruction, which had not been challenged, and court found that prisoner had fallen short of meeting his burden of showing not merely that trial errors created possibility of prejudice, but also that such errors worked to his actual and substantial disadvantage, injecting his entire trial with error of constitutional dimensions); Engle v. Isaac, 456 U.S. 107, 135 (1982)(holding that defendants were banned from asserting their constitutional claim in federal habeas corpus proceedings because constitu-

tent results are inevitable in a wide range of cases where appellate courts must defer to a trial court's decision. One wonders why the Chief Justice is not more concerned about the inequality resulting from limited review. In addition, Chief Justice Rehnquist seems unconcerned that limiting review of facts reduces protection of federal rights.[52]

Third, Chief Justice Rehnquist's proposal to eliminate the right to appeal would "allow [appellate] review only when it is granted in the discretion of a panel of the appellate court."[53] He stops short of urging denial of the right of appeal to all litigants raising certain kinds of claims. Such a proposal would raise serious constitutional questions.[54] In any event, the Chief Justice's proposal is flawed because the panel would have to consider the merits of the litigant's claim to decide whether to exercise its discretion. Indeed, I doubt that the panel's deliberations would be much different from the screening procedures currently in place in some circuits.[55] Within the Fifth Circuit, for example, an increasing number of appeals are decided without oral argument or a published opinion.[56] Unless such a system is administered arbitrarily, the Chief Justice's proposal invites satellite litigation on how the court ought to exercise its discretion.

Finally, making appellate review discretionary raises constitutional problems. Although traditional wisdom suggests that Congress has plenary power over whether to create lower federal

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tional claim was forfeited in state court due to lack of contemporaneous objection to jury instruction); Wainwright v. Sykes, 433 U.S. 72, 91, *reh'g denied*, 434 U.S. 880 (1977)(emphasizing importance of state's contemporaneous objection rule).

[52] For example, Chief Justice Rehnquist wrote the opinion of the Court in *Sykes*, and joined Justice O'Connor's majority opinions in *Frady* and *Isaac*.

[53] Rehnquist, *supra* note 12, at 22.

[54] The extent to which Congress can selectively curtail access to federal courts has been debated heatedly in the scholarly literature. In 1981, various bills were before Congress which would have selectively denied access to specific classes of litigants. Those bills produced extensive hearings in Congress. *See, e.g., Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary on S.158*, 97th Cong., 1st Sess. (1981). For a broad spectrum of views on the constitutionality of selective jurisdiction withdrawal legislation, *see generally*, Long, *Symposium Congressional Limits on Federal Court Jurisdiction*, 27 VILLANOVA L. REV. 893, 895-928, 1030-1041 (1982).

[55] *See* Carrington, *supra* note 46, at 430.

[56] *Proceedings*, *supra* note 8, at 549-50 (comments of Judge Rubin); *see also*, Clerk's Annual Report, *supra* note 36, at i (giving percentages of cases decided by summary disposition).

courts,[57] the drafters of the Constitution also envisioned meaningful appellate review by the Supreme Court. However, the modern caseload makes impossible effective review by the Supreme Court; hence, the original function of the Supreme Court must be shouldered by the courts of appeals.

Professor Eisenberg has developed a similar position.[58] His article challenged the traditional position advanced by Professors Hart and Wechsler that, because lower federal courts were not established by Article III, Congress may abolish their jurisdiction as it sees fit.[59] Eisenberg argues that the drafters of the constitution envisioned a critical function for the judiciary. Of course, its primary role was as a check on the power of co-equal branches within our tripartite system.[60] However, delegates to the Constitutional Convention also envisioned other functions of a national judiciary. Specifically, federal courts "achieve uniformity of decision on questions of national concern . . . [and help] ensure that federal interests take precedence over those of any particular state in matters of federal competence."[61] The judiciary was "intended, perhaps above all else, to be able to hear and do justice in all cases within its jurisdiction," and was conceived of "as [an] instrument for the protection of individuals."[62] Relying on the Federalist papers, Eisenberg argues that "[t]his emphasis . . . strongly suggests that the Framers intended that national tribunals would hear each case within the federal judicial power"[63]

Admittedly, the foregoing analysis, by itself, does not compel the conclusion that appellate review is constitutionally required. One might argue that, even assuming a federal court must be available to a federal right holder, it need not be an appeals court. After all, Congress did not create the courts of

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[57] *See generally*, M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, 21-34 (1980)(discussing Congressional power to ordain and establish lower federal courts).

[58] Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

[59] *Id.* at 501-04.

[60] *Id.* at 505.

[61] *Id.*

[62] *Id.* at 506.

[63] *Id.* at 507.

appeal for a hundred years.[64]

However, Professor Eisenberg would probably respond by saying that such an argument overlooks the Supreme Court's capacity during that early period of history. As Eisenberg contends " . . . the Founding Fathers felt that the right to appellate review by the Supreme Court would be sufficient to ensure that all litigants with cases within the federal constitutional jurisdiction would have their cases heard by a national tribunal."[65] Delegates to the Convention expected the Supreme Court to check erroneous state court decisions in what were expected to be only a few federal cases.[66] Given these early expectations that federal cases would be infrequent, it was originally thought that the Supreme Court could exercise meaningful appellate review. Because lower federal courts were not mandated, "[t]he federal forum may have been limited to appellate review, but it was to be available in all cases."[67] Thus, under this original view, any litigant with a federal claim would have access to appellate review in a federal appellate court even if the action were originally tried in state court.[68]

The Supreme Court has never had to decide the constitutionality of wholesale withdrawal of federal appellate review, but it seems clear that the Founding Fathers envisioned meaningful review in a federal appellate court. To that end, it must be conceded that courts of appeals are now essential because the modern Supreme Court is no longer able to perform its constitutionally defined role as appellate arbiter of cases arising under federal law.[69]

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[64] Carrington, *supra* note 36, at 414.

[65] Eisenberg, *supra* note 58, at 508.

[66] *Id.* at 508-09.

[67] *Id.* at 509.

[68] *Id.* at 508.

[69] *Id.*

One is tempted to ask how the framers could both intend the federal judiciary to be capable of hearing all cases within its jurisdiction and at the same time not explicitly incorporate inferior federal courts into the constitutional scheme. The answer is that the Founding Fathers felt that the right to appellate review by the Supreme Court would be sufficient to ensure that all litigants with case within the federal constitutional jurisdiction would have their cases heard by a national tribunal. This faith in the availability of Supreme Court review was in evidence at the Constitutional Convention. Rutledge em-

The Supreme Court's legislative courts decisions lend additional support to the argument that Article III judicial review is constitutionally mandated, at least in some circumstances. For over fifty years, often aiming at greater efficiency, Congress has given non-Article III adjudicators jurisdiction over cases within the competence of Article III courts.[70] As the caseload pressure becomes more acute, Congress is likely to experiment further with informal adjudication. Thus, the Supreme Court's legislative court decisions attempt to identify outer limits for such experimentation.

At one extreme, some noted scholars have argued that the Constitution contemplated only Article III courts, making invalid any alternative methods of adjudication within the federal system.[71] As observed by Professor Charles Allan Wright, Article III "would seem to be a very clear declaration that the judicial power . . . can only be conferred on courts where the judges enjoy tenure for good behavior, and assurance against diminution of salary, protections that the Framers, and all succeeding generations, have thought of vital importance in preserving judicial independence."[72]

However, as early as 1829, the Supreme Court began eroding that clear declaration. In *American Insurance Co. v. Canter*,[73] the Court upheld a judgment of a territorial court manned by non-Article III judges. The case involved the validity

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> ployed it as a rationale for not including any lower federal courts in the constitutional scheme. Luther Martin explained in his fellow Marylanders that he did not think that lower federal courts were necessary because, "by giving an appeal to the Supreme Court of the United States, the general government would have a sufficient check over [state] decisions and security for the enforcing of their laws . . . .

Id.

[70] *See* C. WRIGHT, *supra* note 14, at 42 (although Congress created legislative courts early in our history, "[t]he modern expansion of the 'legislative court' concept began in 1923 . . . .").

[71] *See, e.g., id.* at 39-40; Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 229 (1983)(discussing effect of *Northern Pipeline* decision which held questioned exercise of jurisdiction of Bankruptcy Courts unconstitutional because their judge lacked Article III's protection of salary and tenure).

[72] C. WRIGHT, *supra* note 14, at 39-40.

[73] 1 Pet. 511, 7 L. Ed. 242 (1829).

of a sale of salvaged cargo, a matter one would have assumed to be within admiralty jurisdiction.[74] The Court held that territorial courts were not "constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. [Territorial courts] are incapable of receiving it."[75] According to the *Canter* Court, Congress created such courts based on power found *outside* Article III (in this instance power over the territories) and that found in the "necessary and proper" clause.[76]

Upon close scrutiny, the Court's legislative courts doctrine, from its beginning in *Canter*, seems incoherent. That the Constitution gives Congress power over the territories proves too much. For example, the Constitution also places power over interstate commerce in Congress,[77] and yet Congress presumably could not create legislative courts to resolve all disputes arising in interstate commerce. In addition, Chief Justice Marshall's assertion that territorial courts are incapable of receiving Article III power also makes no sense.[78] Indeed, the Supreme Court, capable of receiving only matters within Article III judicial power, has repeatedly reviewed decisions by legislative courts like the territorial court in *Canter*.[79] Hence, the matter must be within Article III.[80]

The legislative court concept has a history of inconsistent rationales and results even when the Court has had to decide whether judges on a particular court were Article III judges.[81] To

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[74] U.S. Const., art. III, § 2. Elsewhere in *Canter*, Chief Justice Marshall recognized that were such a case tried outside the territories, it would be within the admiralty jurisdiction. *Canter*, 1 Pet. at 545.

[75] *Canter*, 1 Pet. at 546.

[76] *Id.*

[77] For an interesting discussion of that problem, *see* Resnik, *supra* note 17, at 584-92.

[78] *See* C. WRIGHT, *supra* note 14, at 41-42.

[79] *Id.*, citing Durousseau v. United States, 10 U.S. (6 Cranch) 307, 3 L. Ed. 232 (1810).

[80] *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962)(Justice Harlan's effort to explain apparent contradiction).

[81] *Compare* O'Donoghue v. United Sates, 289 U.S. 516 (1933)(District of Columbia Courts held to be Article III courts) *with* Ex parte Bakelite Corporation, 279 U.S. 438 (1929)(extended *dicta*, District of Columbia courts characterized as legislative courts). On the Court's shifting rationales, see C. WRIGHT, *supra* note 14, at 42-50. Professor

be sure, Supreme Court decisions concerning the topic have ignored the Constitution's express language.[82] However, while the Court has often abandoned its own rationale,[83] it has been consistently pragmatic. Its decisions have almost uniformly upheld Congress' choice of less formal adjudication in spite of Article III's express language.[84] Indeed, from a pragmatic perspective one can only imagine what life would be like in our nation's capital without administrative agencies handling vast numbers of what otherwise look like Article III cases and controversies.[85]

Justice Brennan attempted to give coherence to the doctrine in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[86] the only major decision by the Court denying Congress authority to create legislative courts. However, Brennan's effort failed to secure a majority of the Court and thus resulted in an obviously weakened plurality opinion.[87] At any rate, *Northern Pipeline* struck down the 1978 Bankruptcy Act as a violation of Article III. In doing so, Brennan first grouped many of the Court's earlier decisions into three categories: (1) territorial courts and local District of Columbia courts, where " 'Congress has the entire control . . . for every purpose of government;' "[88] (2) courts martial, like territorial courts, where the Constitution gives "extraordinary control over the precise subject matter at issue;"[89] and (3) public rights cases, a doctrine which "may be explained in part by reference to the traditional principle of sov-

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Wright specifically observes the absence of a "clear analytical answer as to when a court is 'legislative' . . . ." F. Wright, *supra* note 14, at 48.

[82] C. Wright, *supra* note 14, at 39-40; *see also* Resnik, *supra* note 17, at 585.

[83] C. Wright, *supra* note 14, at 42-50. *See also* M. Redish, *supra* note 57, at 40-51; D. Currie, Federal Jurisdiction in a Nutshell 39-44 (1981).

[84] Resnik, *supra* note 17, at 586.

[85] *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 925 (1988)(asserting that regulatory agencies and welfare offices constitute modern "administrative state").

[86] 458 U.S. 50 (1982)(plurality opinion by Brennan, J.)

[87] Justice O'Connor and Rehnquist concurred, but emphasized that they did not decide the broad question answered by the plurality, "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 by § 241(a) of the Bankruptcy Act of 1978 violates art. III of the Constitution." *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 89 (1982).

[88] *Id.* at 65 (quoting Kendall v. United States, 12 U.S. 524, 619 (1838)).

[89] *Northern Pipeline*, 458 U.S. at 66.

ereign immunity,"[90] which allows Congress to "attach conditions to its consent to be sued,"[91] and which does not violate separation of power concerns because public rights cases involve "prerogatives . . . reserved to the political Branches of Government."[92] For all that, Brennan's three categories accounted for only some of the cases in which Congress has created non-Article III adjudicatory bodies. For instance, the plurality recognized the validity of *Crowell v. Benson*[93] and *United States v. Raddatz*.[94] Both of these cases involved fact finding by a non-Article III adjudicator (a compensation commissioner in *Crowell*, and a magistrate in *Raddatz*).[95] However, neither case fits the plurality's three categories in which Congress is given discretion to place the case in a legislative court.[96]

Brennan's plurality opinion described *Crowell*, the classic administrative agency case, and *Raddatz* as cases where the non-Article III adjudicator was merely an adjunct to an Article III court.[97] The plurality characterized the role of those non-Article III adjudicators narrowly. It identified *Crowell* as a case in which Congress created a substantive federal right.[98] According to Brennan, when Congress creates a right, it "possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the assignment to an adjunct of some functions historically performed by judges"[99] Brennan relied on *Crowell's* argument that juries and special masters fulfill the fact finding function even in Article III courts.[100] However, Brennan emphasized that even where Congress creates adjuncts, it cannot remove " 'the essential attributes' of judicial power"[101] from Article III courts. For that reason, *Northern Pipeline's*

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[90] *Id.* at 67.
[91] *Id.*
[92] *Id.*
[93] 285 U.S. 22 (1932).
[94] 447 U.S. 667 (1980).
[95] *Northern Pipeline*, 458 U.S. at 78-79.
[96] *Id.* at 77.
[97] *Id.* at 81.
[98] *Id.*
[99] *Id.* at 80.
[100] *Id.* at 78.
[101] *Id.*

plurality underscored that the scheme in *Crowell* was valid because "full authority [was reserved] to the [Article III] court to deal with matters of law."[102]

Brennan's plurality recognized that Congress had less leeway in entrusting adjuncts with judicial responsibility in cases involving constitutional rights than in those cases involving congressionally created rights, a distinction which was rationalized as a means of maintaining the separation of powers requirements.[103] Congress is within its province in creating substantive rights, but ". . . when the right . . . is not of congressional creation . . . substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of power to define rights that it has created."[104] The plurality emphasized that *Raddatz* upheld the Magistrate Act as constitutional because " '[t]he authority — and the responsibility — to make an informed, final determination . . . remains with the judge.' "[105]

The common denominator in *Crowell* and *Raddatz* is the availability of review by an Article III judge. To be sure, partial shifting of litigation to non-Article III courts is in vogue because it allows less expensive, more expeditious disposition of cases.[106] But, as indicated by Brennan's plurality opinion in *Northern Pipeline*, reliance on an adjunct is constitutional only where an Article III court has review power.[107]

Brennan's tidy distinctions in *Northern Pipeline* failed to command a majority of the Court. Justices Rehnquist and O'Connor concurred, emphasizing that they did not address the broad dispute over "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in . . . the Bankruptcy Act of 1978 violates Art. III . . . ."[108] Instead, they fo-

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[102] *Id.* at 81 (quoting *Crowell*, 285 U.S. at 54).

[103] *Northern Pipeline*, 458 U.S. at 81-82.

[104] *Id.* at 84.

[105] *Id.* at 81 (quoting United States v. Raddatz, 447 U.S. at 682).

[106] *See, e.g.*, Rehnquist, *supra* note 12, at 14-18 (arguing for less expensive adjudication).

[107] *Northern Pipeline*, 458 U.S. at 83-84 (critical analysis turned on review by district court).

[108] *Id.* at 89.

cused on the state law contract dispute between the parties that would not have been before the Bankruptcy Court but for the fact that the plaintiff had already filed for reorganization under the Bankruptcy Act.[109]

Justice White dissented in *Northern Pipeline*.[110] After extensive review of the plurality opinion and prior case law, he concluded that "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."[111] Justice White then identified the values to be balanced: the strength of the legislative interest should be weighed against the burden placed on Article III values.[112] Like the plurality opinion, Justice White recognized that appellate review by an Article III court might save a statute creating non-Article III courts:

> . . . *Crowell* . . . suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority.[113]

Justice White stopped short of concluding that appellate review by an Article III court is a necessary condition in a legislative court scheme, but his dissenting opinion underscored the importance of review: ". . . a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court."[114] In the end, despite Justice Brennan's efforts to line up and limit the Court's legislative court decisions, the White approach has prevailed. Indeed, the Court's two post-*Northern Pipeline* decisions rejected

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[109] *Id.* at 90.
[110] *Id.* at 92.
[111] *Id.* at 113.
[112] *Id.*
[113] *Id.* at 115.
[114] *Id.*

the plurality's approach in favor of Justice White's balancing approach urged by Justice White in his *Northern Pipeline* dissent.[115]

The first of these post-*Northern Pipeline* decisions, *Thomas v. Union Carbide Agricultural Products Co.*,[116] rejected a challenge to statutorily imposed binding arbitration. The *Thomas* dispute centered around the Federal Insecticide, Fungicide and Rodenticide Act[117] which compelled companies to share research data, but provided for compensation for its use.[118] Congress mandated that disputes concerning such compensation be decided by arbitration with limited judicial review.[119] In a decision probably best understood in context with a caseload crisis mentality, the Court rejected "rigid and formalistic restraints on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme."[120] Undoubtedly, the majority had in mind Justice Brennan's categories in his *Northern Pipeline* plurality decision. The *Thomas* Court relied, in part, on the availability of review by an Article III court to uphold the constitutionality of Congress's arbitration scheme.[121]

The second post-*Northern Pipeline* case, *Commodity Futures Trading Commission v. Schor*,[122] securely put in place the approach advocated by Justice White in his *Northern Pipeline* dissent. Under the Commodity Exchange Act,[123] the CFTC could resolve reparation claims brought by customers against commodity brokers.[124] Regulations promulgated by the FTC permitted the Commission to hear counterclaims "aris[ing] out

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[115] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).

[116] 473 U.S. 568 (1985).

[117] U.S.C. §§ 136 et seq. (1982).

[118] *Thomas*, 473 U.S. at 571-72.

[119] *Id.* at 573-74.

[120] *Id.* at 594.

[121] *Id.* at 592 (under circumstances of case, review afforded preserved appropriate exercise of judicial function).

[122] 478 U.S. 833 (1986).

[123] 7 U.S.C. § 1 (1982).

[124] *Id.* at § 18.

of the same transaction or occurrence."[125] Those counterclaims included state-law contract actions for brokerage fees.[126]

In *Schor*, the Court distinguished between "personal" and "structural" interests found in Article III.[127] The Court rejected adherence to "formalistic and unbending rules" and relied instead on various factors.[128] Among these factors was the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts . . . ."[129] That is, "a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal [may] impermissibly threaten the institutional integrity of the judicial branch . . . ."[130] The Court considered separation of power concerns, but found them de minimis in *Schor*. Critical to its decisions was the fact that Congress had not withdrawn a class of cases from judicial cognizance.[131]

As important as separation of power concerns, the *Schor* Court recognized an individual litigant's right to an Article III forum. Grounded in Article III, but resembling a due process argument, the *Schor* analysis notes that fairness to a litigant is advanced by having an independent adjudicator.[132] In *Schor*, that factor was not present because "the decision to invoke [the] forum is left entirely to the parties . . . ."[133] Thus, while *Schor's* ad hoc balancing process may lack certainty, it suggests that meaningful review by an Article III court may be necessary to assure fairness in some cases.[134]

Professor Fallon has recently argued that the Court's methodology in *Thomas* and *Schor* "is underdeveloped, its standards

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[125] 17 C.F.R. § 12.19(b) (1988).

[128] *Schor*, 478 U.S. at 840-41 (reversal of lower court ruling that CEA lacked jurisdiction to hear such claims).

[127] *Id.* at 848.

[128] *Id.* at 851.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 854.

[132] *Id.* at 848 (Article III does not confer absolute right to plenary consideration of every nature of claim by Article III court).

[133] *Id.* at 855.

[134] *Id.* at 856 (Art. III, Sec. 1 "serves . . . to safeguard litigants 'right to have claims decided before judges who are free from potential domination by other branches of government' " (quoting United States v. Will, 449 U.S. 200, 218 (1980)).

obscure"[135] and calls for "increased clarity and coherence."[136] Fallon analyzes as two separate lines of precedent the legislative court cases and the adjunct or administrative agency cases.[137] He urges that the Court reject the first tradition involving legislative courts:

> As between the two traditions, the second is much more respectful of Article III. The first, which does not even demand Supreme Court review of the judgments of non-Article III adjudicators, provides no internal guarantee against a frightening displacement of Article III courts. By building upon the more promising line of analysis associated with *Crowell*, an appellate review theory uses precedent not merely as a source of constraints on the use of non-Article III tribunals, but as a fountain of normative guidance.[138]

Fallon believes that effective appellate review "can provide an effective check against politically influenced adjudication, arbitrary and self-interested decisionmaking and other evils that the separation of power was designed to prevent."[139] In addition, Fallon also agrees that appellate review assures fairness to litigants.[140]

Since Professor Fallon readily admits that his theory "may be controversial" because it is inconsistent with the rationale of one line of cases,[141] I feel inclined to disagree with him in two minor details. First, no consistent line of reasoning is present in the legislative court cases.[142] Justice Brennan's *Northern Pipeline* analysis attempted to order the field, but was quickly rejected.[143] Nonetheless, *Northern Pipeline* dramatized the need for and lack of coherence in the field. It also merged the two lines of precedent: according to Justice Brennan, unless Congress legislated within one of three narrow categories, it could

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[135] Fallon, *supra* note 85, at 933.
[136] *Id.*
[137] *Id.* at 946.
[138] *Id.* at 947.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *See* authorities cited *supra* note 83 and accompanying text.
[143] *See* discussion *supra* notes 86-134 and accompanying text.

create an adjunct adjudicator only if significant control over that adjunct remained in an Article III court.[144]

Second, since *Northern Pipeline*, the Court has continued its efforts to order the law.[145] The Court has not explicitly held that appellate review is a necessary condition in schemes relying on non-Article III tribunals, but its recent cases point in that direction because of reasons articulated by Professor Fallon: "To the extent that questions of fidelity to legal norms can be immunized from judicial inquiry, separation of powers values are part at risk. The fairness interests of litigants may also be compromised insofar as non-Article III federal adjudicators are tempted by opportunities for self-aggrandizement or are subject to political or other pressures."[146]

Schor and *Thomas* abandoned the analysis developed in a long line of cases.[147] That analysis indeed may be in need of reexamination. However, *Schor* and *Thomas* can best be understood as the Court's efforts to give Congress substantial leeway in finding solutions to the caseload crisis. Brennan's opinion in *Northern Pipeline* created doubt about the constitutional validity of non-Article III adjudicators.[148] But *Thomas*, *Schor*, and Brennan's *Northern Pipeline* opinion nonetheless have a common thread - a belief that Congress's ability to place cases in non-Article III courts may depend on the availability of at least some review by an Article III court.[149]

Consequently, proposals to abandon the right to appeal must be examined in that context. Pressure is on Congress to create alternatives to Article III adjudication,[150] but the ability

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[144] *Northern Pipeline*, 458 U.S. at 73 (while independent courts are not required for all federal adjudications where Art. III does apply, Art. I is subject to its provisions).

[145] *See supra* notes 115-34 and accompanying text.

[146] Fallon, *supra* note 85, at 950-51.

[147] While that analysis was often inconsistent, the legislative court cases never articulated a balancing test. Even Justice White, the proponent of the balancing test, recognized that ". . . a balancing approach stands behind many of the decisions upholding Art. I courts." *Northern Pipeline*, 458 U.S. at 113-14.

[148] *See* P. LOW & J. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-SATE RELATIONS 144 (1987)(suggesting that other legislative courts would violate Article III if the *Northern Pipeline* plurality opinion were applied stringently).

[149] *See supra* notes 86-134 and accompanying text.

[150] *See, e.g.*, Rehnquist, *supra* note 12, at 14-18.

to move adjudication out of federal district courts is contingent on review of the adjudication by some other Article III court. Thus, in a wide range of cases, the Court ironically must preserve effective review by an Article III court in order to achieve its other goal of lessening the caseload of the district courts.

Justice Rehnquist's proposal to abandon the appeal of right is bad policy. Determining which cases are worthy of consideration would either produce time-consuming satellite litigation or would lead to an arbitrary selection process.[151] In addition, such a scheme also raises significant constitutional questions. Throughout our history, a federal right holder has almost always had a federal appellate court available to review its case. Professor Eisenberg has argued persuasively that the Framers intended the Supreme Court to hear such cases and that absent such review, Congress cannot cut off access to lower federal courts.[152]

While the Court has never resolved whether Congress can curtail the right of appeal, it has emphasized that Congress' power to place cases within non-Article III courts may turn on the availability of appellate review.[153] Desire for less expensive and more expeditious adjudication may thus make appellate review by an Article III tribunal a constitutional requirement in an increasing number of cases.

III. Judge Posner's Analysis: Crisis and Reform

Many commentators have proposed reforms intended to cure the caseload crisis.[154] This section focuses on Judge Posner's proposals developed in *The Federal Courts: Crisis and Reform*[155] and urges caution in evaluating Judge Posner's proposals for reform.

Judge Posner argues that federal courts are in need of dramatic reform and attempts to argue that his proposals are politi-

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[151] *See supra* notes 53-56 and accompanying text.
[152] *See supra* notes 65-69 and accompanying text.
[153] *See supra* notes 70-149 and accompanying text.
[154] *See supra* notes 13-14 and accompanying text.
[155] *See supra* note 15.

cally neutral.[156] However, as developed below, no one familiar with Posner's considerable writings will be surprised that his book is rife with political value judgments. Indeed, some of his proposed reforms would unravel liberal reforms made possible by access to federal courts.[157]

Judge Posner uses several chapters of his book to establish that a crisis exists.[158] He argues that federal courts of appeals "cannot be expanded, beyond a point that seems to have been reached, without creating extremely poor working conditions at the court of appeals level (by making each such court too large to function effectively) or placing unreasonable demands on the Supreme Court."[159] Posner concludes that the "crisis in quantity has endangered the quality of federal justice."[160]

However, in response to this crisis, Posner rejects creation of additional courts of appeals, the addition of new judges,[161] and the proposed creation of a super court of appeals.[162] In response it should be said that while these ideas may be flawed, one committed to federal rights might be willing to accept some of the disadvantages of such alternatives to preserve adjudication by independent Article III judges. But in reality Posner does not want to preserve the current status of federal rights, and this is reflected in his proposed "procedural" reforms.[163]

Short of fuller "more radical measures,"[164] Posner suggests several reforms to bring the crisis under control. For example, he suggests increasing filing fees and the minimum jurisdictional amount. (Since publication of Posner's book, Congress has done just that. Effective May 18, 1989, the minimum amount in controversy for federal diversity jurisdiction is $50,000.) He advocates that the prevailing party be awarded reasonable attorney's

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[156] *See, e.g.*, R. POSNER, *supra* note 15, at 208-09 (arguing that judicial restraint is politically neutral).

[157] *See infra* notes 173-78 and accompanying text.

[158] R. POSNER, *supra* notes 15, at 59-166.

[159] *Id.* at 317.

[160] *Id.* at 318.

[161] *Id.* at 99-100.

[162] *Id.* at 162-66.

[163] *Id.* at 319-20.

[164] *Id.* at 319.

fees.[165] He also favors "the expansion of appellate capacity within federal administrative agencies"[166] and a specialized tax court of appeals with exclusive jurisdiction over tax appeals.[167] Most controversial are suggestions that would undo many judicial developments over the past three decades. For instance, he argues for:

> a rededication by federal judges to the principles of judicial self-restraint and institutional responsibility . . . , a reallocation of judicial responsibilities from the federal courts to the state courts, including [among other suggestions] . . . renunciation of habeas corpus jurisdiction to determine the innocence of a state criminal defendant, and finally a greater realism about the interpretation of statutes, and the Constitution and about the economic foundations of many of the common law principles that the federal courts elaborate and enforce.[168]

Posner's "reforms" are undeniably political, dressed up as solutions to the caseload crisis. Having convinced us that we have a crisis, Judge Posner harkens back not only to the place of the collegial judiciary but also presumably to the values of judges willing to ignore the fourteenth amendment and early civil rights legislation, a nice "side effect" of curing the caseload crisis.[169]

Of course, Posner's book has produced critical commentary.[170] Much of the criticism has focused on the political agenda evident below the surface of his procedural reforms.[171] For ex-

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[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 319-20.

[169] *See* Beermann, *Crisis? What Crisis?*, 80 NW. U.L. REV. 1383, 1389-1405 (1986). Beermann concludes that Posner's efforts to characterize "these federal jurisdiction problems as ones of forum allocation and economic analysis of externalities sanitizes them beyond recognition." *Id.* at 1405.

[170] *See, e.g.*, Beermann, *supra* note 169, at 1389-1405; Varat, *Economic Ideology and the Federal Judicial Task*, 74 CALIF. L. REV. 649 (1986); Estreicher, *Conserving the Federal Judiciary*, 84 MICH. L. REV. 569 (1986); Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378 (1985).

[171] *See, e.g.*, Beermann, *supra* note 169, at 1389 ("Posner's book completely lacks any discussion . . . of his . . . proposed reforms . . . Any discussion of major reforms to an important institution is incomplete without consideration of social consequences.");

ample, in responding to Posner's suggestion to reduce review of civil rights and habeas corpus cases, Professor Redish observes that "these suggestions . . . are made in a discussion of achieving the goal of docket reduction, despite the fact that, as Posner acknowledges . . ., broader concerns of federalism are at stake in making decisions whether or not to remove such cases from the federal courts."[172]

Similarly, Redish accuses Posner of ignoring important value judgments implicit in the allocation of jurisdiction between state and federal courts.[173] Posner argues that forcing a litigant to adjudicate a federal right in state court is acceptable in light of history (Congress did not create general federal question jurisdiction until 1875) and of possible review by the Supreme Court.[174] Posner answers concerns about the state court's inability or unwillingness to protect federal rights by asserting that "today the state courts in all areas of the country can . . . be trusted to protect the innocent of whatever race, creed, national origin, or income, with exceptions too few and isolated to justify federal judicial intervention."[175]

Posner "disregards both the relatively minimal chance of Supreme Court review and the dramatic shifts in the role of the federal courts since 1875."[176] His trust in state courts ignores their "lack of . . . independence from political branches of state government and the lack of uniformity in interpretation of federal rights that would result from increased state adjudication."[177] Urging a shift of cases from federal to state court attacks an article of liberal faith. Posner must be aware that his proposal, if accepted, would reverse many of the gains made by civil rights and other liberal groups over the past thirty-five

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Varat, *supra* note 170, at 673 ("Posner may be insufficiently aware of his own ideology and its effect on his social science analysis.") Estreicher, *supra* note 170, at 570 ("The unstated thesis of this book seems to be: the need to husband or 'conserve' federal judicial resources requires a truly 'conservative' agenda for the federal judiciary.").

[172] Redish, *supra* note 170, at 1389-90.

[173] *Id.* at 1387, 1391.

[174] R. POSNER, *supra* note 15, a 133-34.

[175] *Id.* at 187.

[176] Redish, *supra* note 170, at 1391.

[177] *Id.*

years.[178]

Posner also urges greater judicial self-restraint.[179] He analyzes various kinds of self-restraint, "[i.e.] the judge's trying to limit his court's power over other government institutions."[180] Posner is concerned that federal courts will use up their political and judicial capital.[181] Posner asserts that self-restraint "is not a liberal or conservative position, because it is independent of the politics that the other institutions of government happen to be following. It will produce liberal or conservative outcomes depending on whether the courts in question are at the moment more or less liberal than those institutions."[182] In a different place and time, that point may be well-taken, but its application today has a distinct conservative political flavor.[183] For instance, a review of only a few self-restraint cases demonstrates the Supreme Court's use of prudential doctrines there to prevent litigants from asserting federal rights in federal court. Widely criticized as unprincipled,[184] the Court's standing cases are illustrative.

Prior to the mid-1970s, plaintiffs found standing a low threshold. The Court denied standing in *Sierra Club v. Morton*[185] because the plaintiff, a highly regarded environmental group, failed to allege that any of its members used the Mineral King Valley, the area that the Sierra Club sought to protect from commercial development. But the Court's standing requirement was viewed as a minor procedural bar, easily remedied under liberal federal pleading requirements,[186] a fact con-

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[178] *See generally*, Beermann, *supra* note 169.

[179] R. POSNER, *supra* note 15, at 198-222.

[180] *Id.* at 208.

[181] *Id.* at 205.

[182] *Id.* at 209-09.

[183] *See id.* at 209, n.25 (discussing current literature advocating return to judicial activism whereby judges freely overturned legislation regulation economic activity).

[184] *See, e.g.*, C. WRIGHT, *supra* note 14, at 65 (". . . the decisions on standing are not easy to reconcile on their facts. Nor has the theory on standing questions been much more satisfactory.") *See also* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 151 (1970)("Generalizations about standing to sue are largely worthless as such."); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.18 (Supp. 1965)(". . . the Supreme Court's law of standing to sue [is] largely worthless as such.").

[185] 405 U.S. 727 (1972).

[186] FED. R. CIV. P. 15. *See* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).

firmed a year later in *United States v. SCRAP.*[187] In fact, during the early 1970s, commentators could argue that the standing requirement ought to be satisfied whenever the plaintiff had sufficient institutional concern and resources to pursue litigation vigorously.[188] Thus, public interest groups normally would have standing if they could assure "concrete adverseness." As long as other Article III requirements were met, an ideological plaintiff could challenge a wide array of governmental action. Therefore, although the Court never formally adopted such a position,[189] this lenient view found support in the case law.[190]

Since that time, however, the Court essentially has adopted a rigorous approach to standing and held that injury in fact is "an irreducible constitutional minimum"[191] for standing. Indeed, the cases since the mid-1970s signal a "major change in direction" from liberalized standing rules.[192] For instance, lack of standing has been used to prevent consideration of several hard questions pressed by liberal organizations. For example, in *Schlesinger v. Reservists Committee to Stop the War*,[193] the Court barred a group opposed to the war in Vietnam from litigating the legality of Congressmen holding positions in the Armed Forces Reserve. In *Simon v. Eastern Kentucky Welfare Rights Organization*,[194] the Court found that the litigants lacked standing to challenge a new IRS regulation allowing hospitals to qualify as charities even though they did not provide free emer-

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[187] 412 U.S. 669 (1973).

[188] *See, e.g.*, Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973). *See also* K. DAVIS, *supra* note 184, at 208-94.

[189] That position was specifically rejected in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

[190] Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380-83 (1973)(discussing extent to which "injury in fact" is constitutionally mandated). Much confusion resulted from the Court's decision in Baker v. Carr, 369 U.S. 186, 204 (1962) which emphasized that "the gist of the question of standing" was whether a plaintiff alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

[191] *Valley Forge Christian College*, 454 U.S. at 472.

[192] C. WRIGHT, *supra* note 14, at 67.

[193] 418 U.S. 208 (1974).

[194] 426 U.S. 26 (1976).

gency treatment to the indigent. In *Warth v. Seldin*,[195] the Court found that a wide array of plaintiffs, including prospective builders and prospective tenants, lacked standing to challenge a community's restrictive zoning ordinances. The Court also has used standing to bar an attack on a statute permitting disposal of surplus government property to a religious institution.[196] In *Allen v. Wright*,[197] the Court used the standing doctrine to avoid deciding whether segregated schools were charitable institutions within the meaning of the tax code.

The recent emergence of this strict standing requirement has coincided with the "public law litigation" revolution in which "lawsuits were designed to coerce systematic reform or curtailment of government actions . . ."[198] The rigorous new standing requirement, perhaps asserted under the guise of neutral self-restraint, has barred consideration of the merits of the underlying dispute in these cases even in instances where no other plaintiff was available to challenge a constitutional violation.[199] By contrast, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[200] the Court relaxed the standing requirements in order to hear a challenge to the Price-Anderson Act.[201] The environmental group and individual plaintiffs challenged the act's limitation of liability for a nuclear accident as a violation of due process and equal protection. The Court granted standing, only to find the act constitutional.[202] As observed by Justice Stephens in his concurring opinion, the majority based standing on a delicate "string of contingencies."[203] The decision might be explained by the Court's desire to dispel uncertainty regarding the constitutionality of the act, but not by principled and consistent application of its own standard.[204]

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[195] 422 U.S. 490 (1975).

[196] *Valley Forge Christian College*, 454 U.S. at 472.

[197] 468 U.S. 737 (1984).

[198] P. Low and J. Jeffries, *supra* note 148, at 15 (discussing Chayes, "Forward: Public Law Litigation and the Burger Court," 96 Harv. L. Rev. 4 (1982)).

[199] *Reservists Committee*, 418 U.S. at 227.

[200] 438 U.S. 59 (1978).

[201] 42 U.S.C.A. sec. 2210 (West 1973).

[202] *Duke Power Co.*, 438 U.S. at 82-94.

[203] *Id.* at 102 (Stephens, J., concurring).

[204] *Id.* at 103.

Abstention poses a similar problem. Abstention is "judge-made . . . not authorized by congressional action, and in fact directly [in contravention of] unambiguous congressional directives . . . to adjudicate cases brought to enforce substantive federal rights."[205] Like standing, abstention and the related "Our Federalism"[206] doctrine have been invoked frequently to bar federal courts from hearing cases involving federal rights favored by the liberal community.

Younger v. Harris[207] and its progeny demonstrate the point most clearly. However, in order to fully understand the impact of *Younger*, one must first gain some perspective by analyzing *Dombrowski v. Pfister*,[208] the earlier precedent which *Younger* supplanted. In *Dombrowski*, the Court faced abusive efforts by state officials to frustrate civil rights organizers. While the facts were extreme,[209] the Court's holding was not tied to those facts and appeared to allow litigants free access to federal court to enjoin state prosecutions that might chill exercise of first amendment rights. Thus the Court held:

> A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of first amendment freedoms. . . . When the statute also has an overbroad sweep. . . the hazard of loss or substantial impairment of those precious rights may be critical. . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.[210]

This quoted language applies in any case involving a threatened prosecution of a person alleging that a statute's overbreadth impairs first amendment rights. In other words, the *Dombrowski* Court did not narrow its holding to its unsavory facts.[211]

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[205] Redish, *supra* note 170, at 1399.

[206] Younger v. Harris, 401 U.S. 37, 43-45 (1971). For a critical discussion of *Our Federalism*, *see* M. Redish, *supra* note 57, at 291-321.

[207] 401 U.S. 37.

[208] 380 U.S. 479 (1965).

[209] For an interesting personal account of the events leading to the Supreme Court's decision, see A. KINOY, RIGHTS ON TRIAL 209-55 (1983).

[210] 380 U.S. at 486.

[211] *See* M. REDISH, *supra* note 57, at 293-94.

Unfortunately, whatever the *Dombrowski* Court might have intended is irrelevant after Justice Black rewrote *Dombrowski* in *Younger v. Harris*.[212] *Younger* restricted access to federal court even where a litigant alleged a chilling effect on free expression. The Court assumed as it subsequently held in *Mitchum v. Foster*[213] that section 1983[214] was an express exception to the Anti-Injunction Act.[215] Thus, the conclusion would follow that Congress gave the federal courts jurisdiction over claims like those raised in *Younger* and its companion cases. Nevertheless, despite the lack of any statutory authority for declining such jurisdictions, the *Younger* Court indeed refused to exercise jurisdiction.[216] Despite being championed as a form of judicial restraint, *Younger* represents a form of back door judicial activism.[217] As observed by Professor Redish, abstention amounts to "a blatant — and indefensible — usurpation of judicial authority."[218]

Younger's analysis of *Dombrowski* has generated strong criticism:

> . . . Justice Black. . . disposed of [*Dombrowski*] with a degree of disingenuosness remarkable even by Supreme Court standards. . . The *Younger* Court's approach to *Dombrowski* . . . misleadingly. . . dismiss[ed] what was in reality the decision's central thrust — recognition of the special nature of first amendment claims and the danger of a chilling effect caused by relegating a litigant's constitutional challenge to a criminal defense — as just so much aberrational dicta.[219]

Younger compels a person to abandon his first amendment rights to avoid prosecution or to litigate his claim along the long road through state court and only then to a federal district court in habeas proceedings, proceedings which Posner incidentally

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[212] 401 U.S. 37 (1971).

[213] 407 U.S. 225 (1972).

[214] 42 U.S.C. § 1983 (1981).

[215] 28 U.S.C. § 2283 (1978).

[216] *Younger*, 401 U.S. at 44.

[217] *See* Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74-75 (1984).

[218] *Id.* at 72.

[219] M. REDISH, *supra* note 57, at 297.

suggests should be dramatically curtailed.[220]

Moreover, the Court has continued to extend "Our Federalism" in post-*Younger* cases. For example, *Younger* applies even if a litigant seeks non-coercive declaratory relief.[221] Presumably, declaratory relief does not create the same friction with state court judges as does injunctive relief.[222] The Court has also applied *Younger* in civil proceedings in which the state is a party.[223] Unlike criminal defendants, civil litigants cannot avail themselves of a federal forum through habeas corpus proceedings and instead must rely on the severely limited chance of review by the Supreme Court.

At some point in the future, judicial self-restraint may frustrate a conservative agenda.[224] However, that was not true during the tenure of Chief Justice Burger and despite characterization of Chief Justice Rehnquist as a conservative opposed to judicial activism, he has fully endorsed cases like *Younger*.[225] Thus, Judge Posner's assertion that self-restraint is a politically neutral and a worthy method for attacking the burgeoning caseload is a hollow and thinly veiled attempt to advance his conservative philosophy.

All in all, my focus on Posner's book is intended to demonstrate a straightforward point. Concern about the caseload crisis can be manipulated to impair the liberal reforms accomplished only because of access to the federal courts. Posner's faith in equivalent justice in state courts[226] flies in the face of the widely held belief that federal courts are sympathetic and expert in adjudicating federal rights.[227]

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[220] R. POSNER, *supra* note 15, at 187-88.

[221] Samuels v. Mackell, 401 U.S. 66 (1971).

[222] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974). *But see* M. REDISH, *supra* note 57, at 303-04.

[223] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979)(*Younger* applied to federal suit to enjoin operation of Texas' judicial protection of minors); Juidice v. Vail, 430 U.S. 327 (1977)(*Younger* barred federal action against state contempt proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977)(*Younger* applied to federal cation brought to enjoin state civil proceedings to recoup fraudulently obtained welfare payments).

[224] R. POSNER, *supra* note 15, at 208-09.

[225] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979)(opinion by Rehnquist, J.); Juidice v. Vail, 430 U.S. 327 (1977)(opinion by Rehnquist, J.).

[226] R. POSNER, *supra* note 15, at 187.

[227] Redish, *supra* note 170, at 1390-91.

Before abandoning open access to the federal courts, we ought to examine any number of other reforms. One might simply accept that federal courts must handle the caseload because the nation's business has grown so dramatically.[228] That is, one ought to question conservative critics who portray the federal courts as aggrandizing their position by intruding into the province of the other co-equal branches of government.[229] I have not noticed a diminished role for the executive or Congress. Quite the contrary, the judiciary must expand if it is to function as a check on co-equal branches of government which have grown dramatically over the past fifty years.

If a circuit cannot accommodate more than, say, fifteen judges, more circuits might be preferable to Posner's alternative of removing cases from the federal to the state system.[230] More circuits may result in less uniformity than within the current federal system, but more uniformity, expertise, and sympathy towards federal rights than within the fifty state court systems. Although a super court of appeals may be imperfect, such a court may allow for more circuits because the super court might effectively review inconsistent decisions from the various circuit courts of appeals.[231] Thus, more circuit courts of judges need not yield more uncertain and conflicting case law.

I do not dismiss all attempts to reshape federal court jurisdiction in order to address the caseload problem. A close examination of cases now within the federal system might reveal that some kinds of cases do not require the special protection associated with Article III courts. Perhaps, as urged by Judge Rubin[232]

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[228] *See, e.g.*, Howard, *supra* note 9, at 368 ("In the 1970's alone, there were seven new federal agencies created, such as EPA and OSHA . . . .").

[229] *See, e.g.*, Grazer, *Toward an Imperial Judiciary*, 41 PUB. INT. 104 (1975); Uddo, *A Wink from the Bench: The Federal Courts and Abortion*, 53 TUL. L. REV. 398 (1979). Justice Rehnquist has implied the same criticism. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604-06 (1980)(Rehnquist, J., dissenting).

[230] *See, e.g.*, Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1463-64 (1983)(increasing number of judges preserves individual judge's responsibility for decision making).

[231] Posner rejects proposals for a national court of appeals. R. POSNER, *supra* note 15, at 162-66. For one such proposal, see Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208-47 (1975).

[232] Rubin, *supra* note 5, at 657.

and Professor Wright,[233] diversity jurisdiction ought to be eliminated or altered. Furthermore, a liberal writer might suggest "procedural" reforms different from those urged by Judge Posner. Judges in the Eleventh Circuit, for example, would realize significant diminution of their caseload if states within that circuit were to outlaw the death penalty.[234] However, no one would be fooled that such a suggestion was motivated primarily by concern about overworked federal judges.

Reform may come, but I doubt that it will be radical. Like promises to reform the tax code,[235] efforts to reshape federal jurisdiction in Congress would be met by heavy pressure from powerful interest groups.[236] Those with the least political power may be excluded from federal court while they may be the litigants most in need of access to federal court. Thus, significant changes in the caseload are improbable, and many proposed reforms, as discussed above, are unwise.

IV. The Lawyer's Role

In the previous sections, I have argued that efforts to curtail federal court jurisdiction may raise constitutional concerns[237]

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[233] C. Wright, *supra* note 14, at 127-37. Note that Congress recently responded to such proposals and increased the minimum amount in controversy for federal diversity jurisdiction to $50,000. However, it could be seriously questioned whether the last such increase (to $10,000) had any real effect on the case load or if plaintiff's attorneys merely responded by adjusting the damages clause.

[234] By some estimates, as much as 30 percent of the work of the Eleventh Circuit is devoted to death penalty cases. "Lawyers for Death Row," The Washington Post, January 11, 988, Sec. A, p. 10 (Judges on the Eleventh Circuit complain that "more than 30 percent of its docket is tied up with death penalty cases.").

[235] *See* Bittker, *Tax Reform — Yesterday, Today, and Tomorrow*, 44 Wash. & Lee L. Rev. 11, 13 (1987)(describing political compromise leading to 1986 Tax Reform Act); Yorio, *Equity, Efficiency and the Tax Reform Act of 1986*, 55 Fordham L. Rev. 395, 395 n.2 (1987)(describing history of passage of the act).

[236] *See* C. Wright, *supra* note 14, at 137 ("It is unfortunate that the future of diversity jurisdiction is not likely to be resolved by objective consideration of the arguments for and against this head of jurisdiction. Any proposal to modify diversity meets immediate organized opposition from those who believe that they have a vested interest in preserving, for their own advantage, the widest possible choice of forum."); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1, 52 (1978)(diversity is still strongly supported by the Association of Trial Lawyers of America and corporate lawyers).

[237] *See supra* notes 57-149.

and that proposals for reform of federal court jurisdiction are often motivated by ideology, not by concern about the pace of life in judges' chambers.[238] I have also speculated that coherent reform in Congress is improbable.[239] An examination of the recent past demonstrates that calls for reform have not produced significant results. Congress has tinkered with the system, for example, by dividing the old Fifth Circuit into the Fifth and Eleventh Circuits[240] and by creating a limited number of new judgeships.[241] In addition, courts themselves have instituted reforms that have helped move cases more expeditiously without additional resources. For example, the Fifth Circuit has relied increasingly on its summary docket to avoid oral argument[242] and on the power to render decisions without published opinions.[243]

Recent reforms demonstrate what is likely to be the course of the future: many of the changes will make more efficient use of limited judicial resources.[244] In this section, I examine the role of the lawyer in the appellate process. While curtailing federal jurisdiction radically is undesirable and politically unlikely, properly educated appellate lawyers can make the system work more expeditiously and thus diminish part of the caseload problem.

Former Chief Justice Burger has been a frequent critic of legal education and lawyer competence.[245] In a 1973 speech, the

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[238] *See supra* notes 155-231.

[239] *See supra* notes 232-36.

[240] Fifth Circuit Court of Appeals Reorganization Act of 1980, 28 U.S.C.A. §§ 41, 44, 48 (West Supp. 1988). *See* Reavley, *The Split of the Fifth Circuit: Update and Finnis*, 12 TEX. TECH. L. REV. 1 (1981); Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787 (1980).

[241] *See* C. WRIGHT, *supra* note 14, at 12.

[242] *See* RUBIN, *supra* note 5, at 650.

[243] *See Proceedings*, *supra* note 8, at 549 (remarks of Judge Rubin).

[244] In preparing this paper, I located a report less than ten years old which concluded after deliberation that word processing would speed up distribution of draft opinions. It was more cautious in its assessment of electronic mail. *See* J. GREENWOOD & L. FARMER, THE IMPACT OF WORD PROCESSING AND ELECTRONIC MAIL ON UNITED STATES COURTS OF APPEALS (1979). New technologies will inevitably help the judicial process. For example, computers which can transform the spoken word to type-written form will bring obvious time savings in preparation of trial transcript, draft opinions and correspondence.

[245] *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and*

Chief Justice observed that "many judges in general jurisdiction trial courts have stated. . . that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent."[246] He cited one former colleague who put at two percent the number of genuinely qualified lawyers.[247]

Inadequate appellate counsel impairs the process in two important ways. The first is that counsel may file frivolous appeals that should not be appealed at all.[248] For example, an appeal may raise a challenge to findings of fact beyond the reach of an appeals court or a claim which has been waived because of a procedural default. Most of the attention on frivolous litigation has focused on this kind of inadequacy.[249] The stereotypical overly litigious appellants are attorneys who represent criminal defendants, especially death row inmates,[250] and prisoners who become persistent writ writers in post-conviction and civil rights cases.[251]

Less visible is the time lost as a result of a second form of incompetence: poor briefs and inept appellate argument. Judges' criticism of the poor quality of briefs is often sharp.[252] They contend that many briefs are useless to the court. Inadequate briefs waste valuable judicial resources. The late Judge Tate's criticism underscores that the judge is compelled to perform the attor-

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Certification of Advocates Essential to Our System of Justice, 42 FORDHAM L. REV. 227 (1973).

[246] *Id.* at 234.

[247] *Id.* at n.14 (citing Tamm, *Advocacy Can be Taught — The N.I.T.A. Way*, 58 A.B.A. J. 625 (1973).

[248] A great deal of attention has been given frivolous appellate litigation. *See* Cochran, *Trouble on the Horizon: The Caseload Problem with the "Frivolous Appeal,"* 2 FIFTH CIRCUIT REP. 249, 251 nn.27-28 (1985).

[249] *See* Martineau, *Frivolous Appeals: The Uncertain Federal Responses*, 1984 DUKE L.J. 845, 848 (focus on "use of sanctions to penalize appellants and their attorneys . . . .").

[250] *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880,895 (1983)(discussing successive habeas corpus petitions); Brogdon v. Butler, 824 F.2d 338, 343-44 (5th Cir. 1987)(Clark, J. concurring)(emphasizing need to impose sanctions for delay in death penalty cases).

[251] *See* Cochran, *supra* note 248, at 251. *See also* Gabel v. Lynaugh, 835 F.2d 124 (5th Cir. 1988).

[252] *See, e.g.*, Burger, *supra* note 245, at 231 n.8; Tate, *Federal Appellate Advocacy in the 1980's* 5 AM. J. TRIAL ADVOC. 63 (1981), *reprinted in* R. MARTINEAU, CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE 55-56 (1987).

ney's work when the appellate brief is inadequate:

> If the brief is turgid, if it is long-winded in making its points, if the issues it raises are unnecessarily numerous (and from experience an appellate judge senses many arguments of error indicate a grasping at weak straws in the absence of even one strong contention), the brief is less likely to direct the judge's attention to the points the advocate wishes to make. For the most effective contribution to the judge's decision of an appeal, it is essential that the appellate advocate make careful selection of issues, authorities and relevant facts to be cited, describe them accurately (including their weaknesses) with appropriate citation, and be concise and lucid in presentation of the argument. Otherwise, the appellate judge may use the brief only for a cursory check of the result reached by a proposed opinion, virtually as if counsel had filed no brief at all.[253]

The extent of poor briefing is difficult to estimate, but judges suggest that it is significant.[254]

Commentators can identify a number of causes for such poor advocacy,[255] and legal educators cannot avoid a substantial portion of the blame. For example, an ABA report criticized law schools for their role in producing inadequate appellate attorneys.[256] Their failings are several. One is inattention to appellate skills.[257] Two, despite almost exclusive emphasis on appellate opinions, law professors ignore appellate courts as institutions, leaving the lawyer ignorant about "functions of the appellate court (error correction and law development), the goal of the appellate judge. . ., and the difference in functions between an intermediate appellate court and a supreme court. . . ."[258] Students graduate ignorant of appellate jurisdiction, appellate rules, and trial rules (like issue preservation) that affect appellate liti-

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[253] Tate, *supra* note 252, at 67-68.

[254] *Id.*

[255] *See, e.g.*, M. FONTHAM, WRITTEN AND ORAL ADVOCACY (1985) at 53-54.

[256] *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129, 133 (1985) Report and Recommendation of the Committee on Appellate Skills Training, Appellate Judges' Conference, Judicial Administration Division of the American Bar Association.

[257] *Id.* at 131.

[258] *Id.* at 137.

gation.[259] These gaps in a litigator's knowledge add inappropriate appeals to the caseload because attorneys file suits properly dismissed on procedural grounds apart from the merits.

The ABA recognized that the vast majority of law schools teach advocacy courses. Those courses are singled out for special criticism:

> First and foremost, these programs treat appellate litigation as involving only two aspects — writing a brief and making an oral argument. They ignore all of the other important ingredients of appellate litigation . . . Second, . . . because they lack a realistic appeal record they do not aid in the development of the skill that is unique to appellate litigation: building a case out of a record. Third, as a result of the first two defects, the issues argued in these programs are usually abstract legal questions without factual content upon which most appeals are decided.[260]

The report's conclusion is poignant: as taught in most schools, moot court programs "do not and cannot be thought of as contributing to appellate skills training."[261]

Law schools must respond to the report. We can do a better job training advocates. However, any such reforms in the law school curriculum will improve only the skills of *future* lawyers and thus will not significantly affect the nature of appellate practice for many years. If the ABA report is correct, most of the appellate lawyers currently practicing in the federal courts were inadequately trained in law school and continue to ply their trade inadequately. Therefore, beyond reforms in legal education, steps must be taken to address the deficiencies of current litigators.

In that regard, it is noteworthy that courts and legislators nationwide have increased interest in sanctions as a way to dam the flood of litigation.[262] Many courts and legislators believe that "frivolous suits have diverted away scarce judicial resources."[263]

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[259] *Id.* at 138.

[260] *Id.* at 142. *See also* M. FONTHAM, *supra* note 255, at 54.

[261] *Id.*

[262] *See generally* Cochran, *supra* note 248; Martineau, *supra* note 249.

[263] Fleming Sales Co. v. Bailey, 1 Fed. Rules Serv. 3d 1501, 1508 (N.D. Ill. 1985).

That is, many believe that imposing sanctions will deter a significant number of lawsuits: ". . .there is a now-identifiable trend to put in place what some believe to be sufficient deterrence factors in the form of assessments of monetary sanctions against unsuccessful litigants and their attorneys for [filing frivolous appeals]. This, its proponents believe, will in turn reduce the number of future appeals."[264]

Despite concerns that "the standard for imposing sanctions is not so liberalized as to chill the vigorous litigation of legitimate claims and defenses,"[265] some courts have begun to employ sanctions in questionable cases. For example, Professor Cochran has argued that in *Hagerty v. Succession of Clement*,[266] the Fifth Circuit used "improper criteria for the imposition of sanctions."[267] The court has also imposed sanctions on *pro se* state prisoners. In *Gabel v. Lynaugh*,[268] the court taxed costs of $10 against prisoners who failed to present the issue appealed upon to the lower court. *Gabel* does not make clear whether the panel was motivated by a desire to deter frivolous litigation or by a need to express its pique.

Concern has been voiced that sanctions will be used to impair open access to courts. To be sure, such access is a positive value in our system.[269] Thus, using sanctions as a device to shift

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[264] Cochran, *supra* note 248, at 251.

[265] *Id.* at 257.

[266] 749 F.2d 217 (5th Cir. 1984).

[267] Cochran, *supra* note 248, at 260 (court's analysis ignores notice requirement before imposition of sanctions; court failed to impose requirement of attorney's knowledge of frivolous nature of appeal before sanctions can be imposed under 28 U.S.C. § 1927).

[268] 835 F.2d 124 (5th Cir. 1988). The court found the appeal frivolous because "we are a court of errors and appeals; and the trial court cannot have erred as to matters which were not presented to it." *Id.* at 125. There are exceptions to that rule, of course. *See* Rojas v. Richardon, 703 F.2d 186 (5th Cir. 1983)(setting criteria for plain fundamental error). The court in *Gabel* also failed to acknowledge that frivolous appeals can often be screened without significant investment of judges' time. *See* Cochran, *supra* note 248, at 261.

[269] F. COFFIN, *supra* note 25, at 16-17. In cases involving indigents, the Supreme Court has frequently emphasized the importance of access to the court system. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971)(state may not deny access to court for indigents who seek dissolution of marriage); Johnson v. Avery, 393 U.S. 483 (1969)(where prisoners not allowed to assist others in preparation of writ there is denial of access to court for illiterates); Douglas v. California, 372 U.S. 353 (1963)(denial of counsel to indi-

attorneys' costs, for example, to the losing party is a strong sanction that could quite likely over-deter plaintiffs from asserting legitimate rights. Even in the current climate of caseload crisis, we should remember that positive law reform has been possible because litigants have been willing to press novel theories.[270]

Thus, the challenge for courts is how to use sanctions to improve the efficient operation of the court system without deterring litigants from pursuing law reform. In *Thomas v. Capital Security Services, Inc.*,[271] the Fifth Circuit *en banc* interpreted amended Rule 11, requiring the district court to impose sanctions in certain instances. The court emphasized that drafts of the amendment to Rule 11 "expressly disclaim[ed] any intent to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[272]

The Fifth Circuit emphasized that district courts must avoid a "natural tendency. . . to gravitate toward imposing" attorneys' fees and costs as sanctions for violations of Rule 11.[273] Instead, "[s]anctions should be educational and rehabilitative in character and, as such, tailored to the particular wrong."[274] Balancing open access to the courts and the need to deter frivolous litigation, the Fifth Circuit "specifically adopt[ed] the principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11."[275] To be sure, the district court's broad discretion includes a wide array of appropriate sanctions. For example, "[w]hat is 'appropriate, may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanction, or other measures appropriate to the circumstances."[276] I urge a similar approach to handle frivolous litigation or poor briefing in

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gent on appeal violates fourteenth amendment).

[270] *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985)("Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself.").

[271] 836 F.2d 866 (5th Cir. 1988)(*en banc*).

[272] *Id.* at 877.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 878.

[276] *Id.*

the appellate court.[277]

I want to particularly emphasize that judges spend a great deal of unnecessary time on items other than frivolous appeals. Commentators have been quick to link wasted judicial time to meritless appeals.[278] That may be true, although in many instances staff counsel identifies such cases, avoiding waste of judicial time.[279] However, poor briefs in non-frivolous cases may waste far more judicial time. A poor brief means that a judge "may use the brief only for a cursory check of the result reached by a proposed opinion, virtually as if counsel had filed no brief at all."[280] Such briefs are quite common in certain classes of cases,[281] notably in post-conviction litigation and in section 1983 litigation. In such cases, the state often submits a "thin" brief with knowledge that the appellate court will do its work. Those two categories of cases comprise a significant portion of the Fifth Circuit's caseload.[282]

I propose that the court rebel against attorneys who waste the court's time. Judges with whom I have spoken informally confirm that state and government attorneys are frequent offenders and that, because the state or United States eventually prevails, the offense goes unnoticed.[283] Courts have available draconian sanctions, for example, dismissal or monetary sanctions.[284] Those ought to be last resorts, but a court would dis-

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[277] Appellate courts have similar discretion available. *See* Martineau, *supra* note 249, at 857-64 (discussing various sources of authority to impose sanctions); *id.* at 869-70 (discussing non-monetary sanctions).

[278] *See, e.g., id. See also* discussion *supra* at notes 262-68.

[279] *See* Cochran, *supra* note 248, at 261 (suggesting that frivolous appeals lend themselves to dismissal without significant investment of time); Rubin & Ganucheau, *Appellate Delay and Cost — An Ancient and Common Disease: Is it Intractable?*, 42 Md. L. Rev. 752 (1983) (describing procedures within Fifth Circuit).

[280] Tate, *supra* note 252, at 68.

[281] This observation is based on discussions both with a number of attorneys and with judges.

[282] For example, prisoner cases and direct criminal appeals represented almost 42% of the Fifth Circuit's caseload in 1986-87. Clerk's Annual Report *supra* note 36, at 13. *See also, id.* at 2 (prisoner appeals cases increased by 353% between 1986 and 1987).

[283] Undoubtedly, the public interest requires that the court not release a prisoner as a sanction for ineffective representation by counsel for the state or government. And yet the fact that courts perform much of the work for the attorney encourages bad work habits. The attorney falsely assumes that winning the appeal was a result of his efforts.

[284] Most of the law on sanctions at the appellate level is aimed at appellants' con-

cover dramatic improvement in the quality of appellate briefs with eventual concomitant time savings if it refused to accept poor briefing by counsel. Following the suggestions in *Thomas*, a court could inform counsel of the inadequacies of his brief, in private, in open court, or in its written opinion.[285] It might refuse to accept careless, indifferent briefs and compel resubmission of the brief. It might also compel the attorney to attend a continuing legal education seminar. If the latter sanction were imposed, some aspiring law school or professional association would undoubtedly quickly put in place a meaningful CLE program, perhaps modeled on the highly successful N.I.T.A. trial advocacy program.[286]

The Fifth Circuit already recognizes its obligation to help educate members of the practicing bar. Members of the Fifth Circuit have participated in various educational programs.[287] They offer a unique perspective.[288] When they speak candidly about their approach to attorneys' work product, the bar listens.

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duct. *See* Martineau, *supra* note 249 at 864-70 (reviewing bases for sanctions). But the court's power to impose sanctions on an appellee might be found in the inherent authority of the court, Roadway Express, Inc., v. Piper, 447 U.S. 752, 764-67 (1980), or in the federal rules of appellate procedure. FED. R. APP. P. 47 (authorizing each circuit to adopt rules not inconsistent with the appellate rules).

[285] Courts have used similar sanctions to reprimand appellants' attorneys. *See, e.g.*, United States v. Potamkin Cadillac Corp., 697 F.2d 491, 495 (2d Cir.)(criticizing attorney for undue delay and vexatious multiplication of proceedings), *cert. denied*, 462 U.S. 1144 (1983); Shuffman v. Hartford Textile Corp., 659 F.2d 299, 305 (2d Cir. 1981)(observing that attorney unreasonably prolonged litigation), *cert. denied*, 455 U.S. 1018 (1982).

[286] *See* Tamm, *supra* note 247 (describing N.I.T.A. trial advocacy program).

[287] *See* example, Fifth Circuit judges participate frequently in the Appellate Advocacy Seminar sponsored by the Bar Association of the Fifth Federal Circuit. Judges' remarks are frequently reprinted in the Fifth Circuit Reporter. *See, e.g.*, Talk by Judge Sam D. Johnson, 2 Fifth Circuit Rep. 345 (1985); Talks by Judges Rubin and Higginbotham, 2 Fifth Circuit Rep. 143 (1985).

[288] The following excerpts from Judge Reavley's remarks at the 1986 seminar demonstrate the kind of candid and helpful insights offered by the judges:

> III. The judge of your case probably will prefer to affirm the trial court and may be weary of the extreme adversarial posture. The judge loveth an honest advocate.
>
> IV. When the judge of your case reads your brief, she will probably not be savoring it with a cool drink on the beach. Nor will she have high anticipation or great curiosity about your cases. She will hope to spend a minimum amount of time to get in mind, promptly and accurately, the relevant facts and the issues which she must decide in order to get your case off her docket.

Fifth Circuit Appellate Practice and Advocacy Seminar, Oct. 23-24, 1986, G-2.

Thus, in addition to sanctions, the Court might consider mandating participation in such programs as a condition of membership in the appellate bar.

The current literature on the appellate process contains many more suggestions on how the appellate courts can deal with caseload pressure. For example, Professor Martineau has advocated a more informal dialogue between judges and attorneys than the all too short formal oral argument.[289] Such discussions might be by conference calls, saving travel time for judge and litigants. Follow up discussions might save the courts' time because attorneys could research areas of the law which under our current approach must be researched by judges and their clerks if those issues are inadequately addressed in the appellate briefs.

Even if we retain formal oral argument, courts might save judicial time by requiring attorneys to submit additional briefs on matters which are inadequately briefed, but which trouble the judges. Unlike my earlier discussion of poor briefing, even counsel who has effectively argued an issue may not have anticipated all of the court's concerns. In both instances, though, I propose that courts save their resources by compelling attorneys to do their own work. Many attorneys would welcome the chance to address the court's specific concerns. No doubt, losing attorneys are greatly frustrated if an opinion is based on analysis not presented in the prevailing party's brief.

This discussion is not exhaustive of possible reforms. Instead I want to generate interest in reforming the appellate process by better management of resources rather than by closing the door to federal right holders. The caseload crisis should remind federal courts that litigants hold them in high regard.

V. Conclusion

When Judge Jolly invited me and fellow panelists to speak at the 1988 Fifth Circuit Judicial Conference, he asked us to consider appeals in the twenty-first century. Appellate practice

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[289] *See* Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 30-31 (1986).

will change in subtle ways which most of us cannot anticipate. However, while appeals will change, I doubt that the changes will be drastic.

As a response to the increased caseload, some people have urged curtailing the appeal of right. That position is premised on the assumption that Congress may eliminate the courts of appeals entirely or shape its jurisdiction however it desires. While not free from uncertainty, such proposals may be unconstitutional.[290] For example, the Supreme Court's legislative courts decisions allow a trade off, permitting Congress to place considerable responsibility for Article III cases in non-Article III bodies. However, essential to such schemes is availability of review by an Article III court. Hence, in many cases, appellate review has become constitutionalized.[291] More importantly, appeals courts now serve the review function originally served by the Supreme Court.[292]

Efforts to reshape federal court jurisdiction are frequently politically motivated. Heavy weight interest groups will effectively scuttle major restructuring of federal court jurisdiction. Non-political proposals may succeed in Congress, but will only involve tinkering with the system and will not change the appellate process in dramatic ways.[293]

Instead, the appellate courts will do what they have done traditionally. They will rely on new technology to improve the process and they will make better use of existing resources.[294] In this article, I have paid particular attention to the role of the lawyer in the appellate process. I concur in observations that lawyers often perform inadequately. Inadequate briefing results in significant loss of judicial time. In many cases, especially those involving post-conviction relief and prisoners' rights, courts do the work for the state. Sensitive use of non-monetary sanctions in such cases could shift responsibility back to attorneys to do their own work, with measurable savings to the appellate courts.

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[290] *See supra* notes 59-149 and accompanying text.
[291] *See supra* notes 70-149 and accompanying text.
[292] *See supra* notes 59-69 and accompanying text.
[293] *See supra* notes 154-236 and accompanying text.
[294] *See* Estreicher, *supra* note 170, at 570-77.

OWNERSHIP OF CROPS ON FORECLOSED LAND, PRIORITY OF CROP LIENS AND AFTER-ACQUIRED PROPERTY CLAUSES IN FARM BANKRUPTCIES

*Preston D. Rideout, Jr.**

I. The Farm Economy in General

> Both in their violence and their uprising they were being faithful to American tradition. . . . At Council Bluffs sixty had been arrested, but when a thousand of their fellow insurgents marched on the jail, they were hastily released. . . . . On the outskirts of a Kansas village police found the murdered body of a lawyer who had just foreclosed on a five-hundred-acre farm. . . . . Throughout Hoover's last winter as President there were foreclosure riots in Iowa . . . Lawyers representing insurance companies in the East were kidnapped and threatened with the noose until the home office relented and agreed to a mortgage moratorium. By the end of January 1933, John A. Simpson, president of the National Farmers Union, told the Senate Committee on Agriculture, "The biggest and finest crop of revolutions you ever saw is sprouting all over this country right now." Edward A. O'Neal, III, president of the American Farm Bureau Federation, added "[u]nless something is done for the American farmer we'll have revolution in the countryside in less than twelve months."[1]

Reminiscent of those last days of the Hoover Administration, our current farming industry has become overwhelmed

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[1] W. Manchester, The Glory and the Dream, A Narrative History of America 59 (1973).

with economic difficulties. America's agricultural industry, basic to our entire economy, has reached a crisis stage and the resultant problems are complex.[2] For instance, from 1979 to 1986 net farm income in Mississippi alone dropped an astronomical 500 million dollars, and one estimate put as many as one-third of its farmers on the verge of bankruptcy.[3] Indeed, the extent of the current crisis in Mississippi is aptly illustrated with a survey of the statistics for 1986, one of the worst years on record for Mississippi farmers.[4] In that year, the state suffered its worst drought in twenty-five years reducing yields by thirty-five percent, and farm income dropped to its lowest level in thirty years, down nearly fifty percent from 1985.[5]

In addition, beyond the problems of nature, there were even greater systemic problems. For example, U.S. farm exports, which peaked in 1981 at forty-four billion dollars, fell thirty-seven percent to 27.5 billion in 1986.[6] In that same year, U.S. agricultural exports to twenty-two of twenty-five consumer nations were down significantly from 1985.[7] This dramatic decline devastated farm operations in Mississippi, particularly in the Delta where at least fifty percent of agricultural sales are made to overseas buyers.[8]

The origins of this problem can be traced to a period of time between the mid-1970s and the early 1980s when the upward spiral of inflation created increased cash flows and spurred many farmers to buy additional land at inflated prices with money borrowed for a long term at high interest rates. The equity produced by continued inflation through the end of this period created collateral against which these farmers could borrow additional funds and allowed them to service their land debt and

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[2] The Kiplinger Washington Letter, Aug. 28, 1987, at 1.

[3] *See* Espy, *Citizen's Must Help Officials Overcome State's Obstacles*, Clarion-Ledger (Jackson, Miss.), Jan. 4,1987, at 1-H, col. 3 (Mississippi Congressman Mike Espy discussing proposed solutions to help revive Mississippi's depressed farming industry).

[4] Alderman, *Farmers Suffer Bitter Disappointment in 1986*, Commonwealth, Dec. 29, 1986, at 1.

[5] *Id.*

[6] Mississippi Economic Council, *Mississippi Delta Hit Hardest By The Decline In Exports, Mississippi Bus.*, Dec. 22, 1986, at 1.

[7] *Farming*, THE J. OF FIN. MGMT. FOR FARMERS AND RANCHERS, Nov.-Dec. 1986, at 11.

[8] Mississippi Economic Council, *supra* note 6, at 1.

continue operations. However, from the early 1980s to the present, the near disappearance of inflation, along with the precipitous decline in the export market, have caused a dramatic deflation in the value of land and thus the disappearance of the essential equity. For example, in Iowa, one of the hardest hit farm states, land values have dropped sixty-four percent since 1981.[9] In fact, since 1982 the value of farmland nationwide has plummeted by an average of thirty-three percent.[10] The most severe declines in 1986 were in the states of Alabama, Mississippi and Louisiana where land values dropped sixteen percent on the average."[11] Thus, farmers who obligated themselves in the late '70s and early '80s to long-term mortgages at high interest rates are now unable to service their huge land debts.[12]

II. The System of Agricultural Finance and the Current Crisis

At the center of this financial crisis is a complex system of agricultural finance, heavily laden with government programs and regulations. Cash flow in the agricultural economy depends primarily on three lending institutions, the largest being the Farm Credit System (FCS), a creature of Congress. The FCS was originally established to provide a stable source of capital for agricultural producers, and at its inception seventy years ago it was capitalized by the federal government.[13] However, in the mid-1960s, the borrower/owners of the system repaid the last of the federal funds.[14] Two arms of the FCS deal directly with agricultural producers: the Federal Land Bank and the Production Credit Associations. The Federal Land Bank was established in 1916 under the provisions of the Federal Farm Loan Act.[15] Its role in the system is to make long-term mortgage loans for the

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[9] Welsh, *Land Deals You Can Make Today*, Farm J., Sept. 1987, at 22.

[10] H.R. Rep. No. 100-295, 100th Cong., pt. 1, at 57 (1987). Based on this report, Congress enacted the Agricultural Credit Act of 1987. Pub. L. No. 100-233, 101 Stat. 852 (1987).

[11] Welsh, *supra* note 9, at 22.

[12] H.R. Rep. No. 100-295, *supra* note 10, at 56.

[13] 12 U.S.C. § 2001 (1982).

[14] H.R. Rep. No. 100-295, *supra* note 10, at 61.

[15] 2 J. Davidson, Agricultural Law, § 10.01 (1981).

purchase of land in rural areas.[16] As part of the Farm Credit Act of 1933,[17] Congress created local Production Credit Associations (PCA's) with their primary purpose being to make short-term crop production loans.[18]

Since 1933, there have been no significant changes in the structure of the Farm Credit System.[19] The FCS's total loan portfolio is now valued at 70.9 billion dollars,[20] although it has admittedly decreased in the last five years.[21] Nevertheless, Federal Land Banks have continued to command the market for farm mortgage credit, currently financing forty-three percent of the farm real estate market.[22]

The second largest agricultural lender is actually a group of lenders comprised of life insurance companies and other commercial lenders which now hold approximately twenty-two percent dollarwise of all outstanding agricultural mortgages.[23] In-

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[16] 12 U.S.C. § 2014 (1982). There are stipulated circumstances under which the Federal Land Banks are authorized to make continuing commitments on these long-term real estate loans. *Id.* The land banks can extend financial assistance to eligible borrowers for loan periods ranging between five and forty years. *Id.*

[17] W. STOKES, CREDIT TO FARMERS 41 (1973). The Farm Credit Act of 1933 was signed on June 16, 1933 by President Roosevelt after considerable congressional debate. *Id.* at 38. Congressman Wall Doxey of Mississippi was a sponsor of the bill and he laid down a principle which the system would have done well to have taken to heart:

> . . . the foundation and groundwork on which it (the Farm Credit Act of 1933) is based is sound business, economical administration, good banking, and mutual helpfulness and benefit to both the lender and the borrower through cooperative efforts of the government and the family.

Id. at 39.

[18] 12 U.S.C. § 2096 (1982). PCA's may also offer similar financial assistance, under qualified terms, to rural residents for housing and to persons furnishing farm-related services to farmers and ranchers. *Id.*

[19] H.R. REP. No. 100-295, *supra* note 10, at 64. The Farm Credit System is a nationwide cooperative with approximately 382 local associations owned wholly by the farmers and ranchers that borrow from them. H.R. REP. No. 100-295, *supra* note 10, at 65.

[20] Bailey and McCoy, *Tricky Ledgers to Hide Huge Losses, Financial Officials Use Accounting Gimmicks*, Wall St. J., Jan. 12, 1987, at 1, col. 6.

[21] H.R. REP. No. 100-295, *supra* note 10, at 65. In January, 1987 the FCS reported a loss of $4.2 billion. Bailey and McCoy, *supra* note 20, at 1.

[22] H.R. REP. No. 100-295, *supra* note 10, at 66. Although there has been competition from other institutions, the Farm Credit System's ability to obtain funds in capital markets on Wall Street historically allowed the system to offer lower interest rates to farmers and ranchers. The system's current problems have caused the loss of this competitive edge. *Id.* at 65.

[23] *Id.* at 66.

surance companies alone hold 11.6 billion dollars in agricultural loans nationwide.[24]

The nation's third largest agricultural lender is an assortment of federal agricultural loan programs, most of which are administered through the Farmers Home Administration (FmHA).[25] In contrast with the FCS, which has traditionally concerned itself with meeting the credit needs of the efficient commercial farmer through conventional banking principles, the FmHA was originally created to keep destitute small farmers on their land and to help them subsist through programs patterned after the Depression era Rural Rehabilitation programs. This focus was somewhat modified in the Agricultural Credit Act of 1961 which established the basic structure and content of today's FmHA programs.[26] FmHA has four basic loan programs: long-term loans for the purchase of farmland; short-term loans to meet operating expenses; emergency disaster loans to assist producers with losses caused by natural disaster, and economic emergency loans which assist producers with miscellaneous economic problems beyond their control.[27] In September 1986, FmHA held 14.2% of all agricultural loans, valued at 29.6 billion dollars.[28]

Due to the downturn in the agricultural economy, these lenders have acquired literally millions of acres of land through foreclosures and bankruptcies.[29] FmHA alone now owns 46,000 farm properties with a combined acreage greater than the land area of Rhode Island.[30] Dubbed the "farm lender of last resort," the FmHA has 270,000 loans. Of this number, approximately one-third of the debtors are having problems making repay-

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[24] Mosby, *Effects of Farm Bankruptcy Statute Already Being Felt*, Clarksdale Press Reg., Dec. 12, 1986, at 1.

[25] 7 U.S.C. § 1981 (1982).

[26] 2 J. DAVIDSON, *supra* note 15, at §§ 11.01-11.11.

[27] H.R. REP. No. 100-295, *supra* note 10, at 71.

[28] *Id.*

[29] The Kiplinger Washington Letter, *supra* note 2. *See also* Welsh, *supra* note 9, at 22 (Farm Credit Services and Farmers Home Administration desire to dispose of acquired land has resulted in increased activity in the land market).

[30] H.R. REP. No. 100-295, *supra* note 10, at 72. The FmHA obtained these properties through forced liquidation (i.e. foreclosure) and through voluntary conveyances. (deed in lieu of foreclosure). *Id.*

ment.[31] In six years the dollar amount of delinquent loans has risen from 820 million dollars to 6.3 billion dollars. Of that 6.3 billion dollars, 4.8 billion dollars (76%) is overdue by three years or more and a significant portion may never be recovered.[32]

In addition to these uncollected FmHA debts, the FCS, as of June 30, 1987, was holding loans totalling 6.47 billion dollars for which neither principal nor interest payments were expected.[33] The FCS reported losses in 1985 of 2.7 billion dollars and 1.9 billion dollars in 1986. It likewise projected total losses for 1987 of 1.28 billion dollars, 1.09 billion dollars for 1988, and 742 million dollars for 1989.[34] The epidemic has also spread to private institutions. For instance, between 1984 and April of 1987, 168 farm banks failed nationwide.[35]

The future is not significantly brighter. As of October 1987, agricultural exports were up seventeen percent over 1986. However, virtually all of the increases were in cotton, livestock, fruits, and vegetables, and the cost to the government was 2.3 billion dollars in subsidies.[36] Land values in 1987 began to stabilize,[37] but because government subsidy payments supported the value in many cases, the only good investments were considered to be in land which could support itself without a subsidy.[38] In land acquisition, agricultural producers today are emphasizing

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[31] Bailey and McCoy, *supra* note 20, at 18, col. 2.

[32] H.R. REP. No. 100-295, *supra* note 10, at 72.

[33] *Id.* at 57. In addition, the system held another $5.3 billion in high risk loans requiring extensive servicing as well as an inventory of $1.1 billion worth of property. *Id.*

[34] *Id.* The FCS apparently remains solvent on paper only because, in 1986, Congress allowed it to adopt the fiscally unsound "non-GAAP" (Generally Accepted Accounting Principle) practice of turning its losses into assets and writing them off over twenty years.

[35] H.R. REP. No. 100-295, *supra* note 10, at 57. The Agricultural Credit Act defines a farm bank as a commercial bank with at least 25% of its loans in agriculture. *Id.*

[36] A. Knox, *Forking Out for Exports*, FARM J., Oct. 1987, at 26. For example, the United States sold 150,000 tons of wheat to China at $1.88 per bushel. Exporters, through the Export Enhancement Program (EEP), received an additional 92 cents subsidy per bushel. In effect, approximately one-third of the sale value was due to the subsidy. *Id.*

[37] Welsh, *supra* note 9, at 22. The favorable returns on investments for cropland, due in large part to government programs helping to produce 7 to 10 percent net returns on investments, are bolstering the market. *Id.*

[38] *Buying Land? Consider This . . .*, FARM J., Sept. 1987, at 37. The best strategy is to buy top quality land that can support itself without program payments. *Id.*

return on investment, not the price of the land.[39] The most recent proposal to Congress is to cut farm subsidies by forty-two percent by the end of 1991.[40] Consequently, if price supports are reduced, exports will again decline, and the value of any farmland dependent upon subsidy payments will in all probability decline sharply. If so, the problems of recent years can only be expected to continue and intensify.[41]

Because of these unpredictable economic factors and the widespread purchase of farm land at inflated prices in the late 1970's and early 1980's followed by the disappearance of inflation and the equity it created, attorneys in agricultural areas are increasingly encountering some unique problems in the areas of property and land finance law.

In addition to familiarizing practitioners with the nature of the problem and the principal players involved, this article attempts to provide a brief summary of the law on three interrelated problems: ownership of crops on foreclosed farmland; priority of liens on these crops; and the effect of after-acquired property clauses in bankruptcy. Specifically, this article will identify the various Mississippi and federal statutes involved and briefly explore the operation of those statutes as construed by various commentators and courts in Mississippi and elsewhere. This article does not attempt to provide a "hornbook" treatment of these subjects, but rather provides a summary of the law for those practitioners who may be encountering these mounting farm problems for the first time.

III. The Problem

Against this economic backdrop, consider the following hypothetical which unfortunately is occurring today at an alarming rate:

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[39] Welsh, *supra* note 9, at 22. *Id. See also, Buying Land? Consider This, supra* note 38, at 26. (concluding that time to buy land is now while it is priced right and land market prices already reflect factored-down government payments).

[40] Clarion-Ledger (Jackson, Miss.), Jan. 6, 1987, at 8B.

[41] *Buying Land? Consider This, supra* note 38, at 37. In addition, when buying land, avoid poor quality land unless it fits your particular investment strategy. For example, one land broker advises: "Buy good ground and you pay for it once - buy poor ground and you pay for it the rest of your life." *Id.*

In January 1987, Richard Roe purchased Black Acre Plantation. He borrowed his purchase money from the Farmers Home Administration (FmHA) and gave FmHA a deed of trust in return.

Roe decides to grow soybeans and cotton and in April of 1987, he borrows the funds necessary to produce his crops from the Production Credit Association (PCA) to be repaid in full no later than January of 1988. He gives PCA a UCC Security Agreement and Financing Statement. His financing statement covers not only his 1987 crops, but it also has an "after acquired-property" clause which grants PCA a security interest in all after-acquired crops or the products or proceeds thereof whenever acquired. The financing statement is properly filed and is effective for five years from the date of filing subject to the right of PCA to render it effective indefinitely by filing a continuation statement every five years.[42]

In January 1988, Roe defaults in the repayment of his loans to FmHA and PCA. Then, in February 1988, Roe files for liquidation under Chapter 7 of the Bankruptcy Code.[43] In April 1988, Roe plants his 1988 crops on Black Acre. In June of 1988, Roe receives his discharge in bankruptcy. Included in his discharge are all debts previously owed to both FmHA and PCA. In July 1988, the Farmers Bank loans Roe funds to be used for the expenses of 1988 crop production. Roe gives the Farmers Bank a UCC Security Agreement and Financing Statement covering his 1988 crops. In August 1988, before the crops are harvested, the trustee forecloses on the Black Acre deed of trust and FmHA buys Black Acre at the foreclosure sale. Notwithstanding the foreclosure, Roe continues to occupy Black Acre and continues to care for and produce his crops.

IV. Ownership of Crops on Foreclosed Land

Who owns the 1988 crop on Black Acre and what are the

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[42] Miss. Code Ann. § 75-9-403(2) (1972). The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse. *Id.*

[43] 11 U.S.C. §§ 701-766, (1982)(outlining liquidation procedures in a chapter 7 bankruptcy).

lien priorities as to this crop? At common law, the mortgagee or beneficiary in a deed of trust, upon foreclosure, became the owner of growing crops. However, crops which were mature and ready to harvest or already harvested belonged to the mortgager or tenant.[44]

A procedure that comes into play in this scenario is the common law summary process of forcible entry and detainer, which has been codified in most states, including Mississippi.[45] Actually, Mississippi has two parallel and virtually identical procedures. One procedure has been established for use in justice court[46] and a second for use in county court.[47]

These statutory provisions provide, *inter alia*, that:

> Any . . . mortgagee, or trustee . . . against whom the possession of land is withheld, by his . . . mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, . . . shall, at any time within one year after such . . . withholding of possession, be entitled to the summary remedy herein prescribed.[48]

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[44] Reiley v. Carter, 75 Miss. 798, 801, 23 So. 435, 436 (1898)(on confirmation of sale in foreclosure, purchaser claimed as absolute owner, and thus had absolute right to all unsevered crops left by defaulting mortgagor); Allen v. Eldering, 22 N.W. 842, 842 (Wis. 1885)(standing oats became property of purchaser of land under foreclosed deed of trust only after such sale was confirmed by the court). Later, by enacting the unlawful entry and detainer statute, the Mississippi Legislature mitigated this earlier common law rule. Under the statute the mortgagor has the right to all crops growing on the property at the commencement of foreclosure proceedings. MISS. CODE ANN. § 11-25-25 (1972). The statute also provides that the evicted mortgagor has the right to re-enter the land for the purpose of completing cultivation and removal of his crops. *Id.*; *see also* Garner v. Stuart Co., 222 Miss. 290, 297, 75 So. 2d 747, 749 (1954)(tenant had right after expiration of lease to reasonable time in which to enter land and collect his growing crop); Wood v. Pace, 164 Miss. 187, 198, 143 So. 471, 473 (1932)(defaulting mortgagor could stay and collect his pecan crop where it was cultivated, maintained and fertilized by him, and such crop was still on trees); Upperman v. Littlejohn, 98 Miss. 636, 646, 54 So. 77, 78 (1910)(where tenant leased land for one year, crops grown during that year were vested in tenant, subject to statutory lien of landlord). *See generally* Annotation, *Right to Crops Grown by One Wrongfully in Possession of Land*, 39 A.L.R. 958 (1925)(as supplemented in Annotation, 57 A.L.R. 485 (1928))(discussing cases contemplating ownership of unsevered crops on wrongfully possessed land).

[45] MISS. CODE ANN. §§ 11-25-1 to -119 (1972).

[46] MISS. CODE ANN. § 11-25-1 to -31 (1972).

[47] MISS. CODE ANN. §§ 11-25-101 to -119 (1972).

[48] MISS. CODE ANN. §§ 11-25-1 to -101 (1972)(note that both § 11-25-1 and § 11-25-101 of the unlawful entry and detainer statutes contain this same language).

In the event of a judgment for the plaintiff, the court issues a writ of possession to the plaintiff, enforceable by the contempt powers of the court.[49] However, with reference to growing crops, the forcible entry and detainer statutes provides:

> . . . [I]n case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom, have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.[50]

While the forcible entry and detainer statutes apply in the case of a grantor under a deed of trust refusing to leave the land after foreclosure and sale by the trustee to a third party,[51] this remedy is available only if the suit is instituted within one year after the right of possession accrues under the trustee's deed,[52] and a defendant who raises this one year statute of limitation as a defense has the burden of proving when his possession became adverse.[53] This statute grants a defendant farmer the right to complete cultivation and removal of his crops provided he first tenders to the plaintiff a reasonable compensation for use of the

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[49] MISS. CODE ANN. § 11-25-23 to -113 (1972)(parallel provisions).

[50] MISS. CODE ANN. § 11-25-25 to -115 (1972)(parallel provisions). For a more complete discussion of this statutory provision and further case law involving ownership of crops on foreclosed land, see *supra* note 44.

[51] *See* Martin v. Leslie, 229 Miss. 656, 659-60, 91 So. 2d 743, 744 (1957)(where grantors remained in possession of property after foreclosure sale and refused to surrender property to grantee of foreclosure sale purchaser, such grantee was entitled to possession of property and reasonable compensation for its use under forcible entry and detainer statute); *cf.* Garner v. Stuart Co., 222 Miss. 290, 296, 75 So. 2d 747, 748-49 (1954)(grantor entitled to reasonable time to gather growing crop after eviction).

[52] MISS. CODE ANN. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Anthony v. Bank of Wiggins, 183 Miss. 885, 892, 173 So. 454, 455 (1937)(mortgagee suit for unlawful entry and detainer dismissed where action was not instituted within one year after right to possession accrued).

[53] Ellis v. Knight, 239 Miss. 836, 838, 124 So. 2d 694, 695 (1960)(defendant claiming that statute of limitations had run on forcibly entry statute has burden of proving when his possession became adverse).

land. This portion of the statute is remedial and thus should be construed so as to give full effect to its stated purpose.[54] Therefore, the plaintiff is not entitled to both the rental value of the land *and* the profits from the crop.[55] Under section 11-25-115, growing crops are considered personal property and even after being dispossessed by writ of possession, the mortgagor is entitled to a reasonable time within which to go upon the land and gather and remove his crops provided he has made payment of a reasonable rent.[56]

Since this is a summary procedure, a judgment for or against the plaintiff does not bar a later action in the circuit court between the same parties regarding the same land.[57] Likewise, a judgment under the forcible entry and detainer statutes is not res judicata as to a later suit in chancery court to confirm title as against an adverse claimant.[58]

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[54] MISS. CODE ANN. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Wood v. Pace, 164 Miss. 187, 196, 143 So. 471, 473 (1932)(court recognized remedial purpose of unlawful entry and detainer statute, and liberally construed it to give former tenant possession of pecans still growing on trees); Joiner v. Leflore Grocer Co., 145 Miss. 31, 50-51, 110 So. 857, 860 (1926)(purchaser at foreclosure sale was not entitled to rent due on property leased by tenant, but only reasonable rental for use after foreclosure, with court noting that statute's purpose was remedial); Parks v. Kline, 118 Miss. 119, 125-26, 79 So. 81, 81 (1918)(citing its remedial purpose, court held operation of statute was not confined to only those crops planted by mortgagor, but action could also be brought for reasonable rental against tenant of mortgagor).

[55] MISS. CODE ANN. §§ 11-25-21 and -111 (1972)(parallel provisions). *See also* Ellis. v. Knight, 239 Miss. 836, 839, 124 So. 2d 694, 695 (1960)(prevailing plaintiff in unlawful entry and detainer action was not entitled to both rental value and loss of anticipated farming profits); Leavenworth v. Crittenden, 62 Miss. 573, 579 (1885)(purchaser of Mississippi river front property entitled to reasonable compensation for use and occupation of the premises from former owner who refused to vacate).

[56] Garner v. Stewart Co., 222 Miss. 290, 75 So. 2d 747, 749 (1954)(tenant had right after eviction to reasonable time in which to enter land and harvest his growing corn crop).

[57] MISS. CODE ANN. § 11-25-119 (1972). *See also* Tate v. Tate, 217 Miss. 734, 736, 64 So. 2d 908, 908 (1953)(court allowed subsequent proceeding in unlawful entry and detainer brought by appellee to obtain possession of house and lot).

[58] Elmer v. Holmes, 189 Miss. 785, 797, 199 So. 84, 87 (1940). In *Elmer*, the appellant claimed title to a beach front house in Biloxi by adverse possession under a parol gift from her father-in-law in 1918. She set up as a defense an earlier decision in an unlawful entry and detainer case favorable to her. *Id.* at 85. Appellee had purchased the house at a foreclosure sale under a deed of trust executed by the heirs of the appellant's father-in-law. *Id.* The Mississippi Supreme Court ruled that an earlier judgment between the same parties, which held that appellee, a foreclosure sale purchaser, was not entitled

If a third party who has purchased the land from a trustee under a deed of trust fails to meet the one year statute of limitations or simply disagrees with a previous judgment on the forcible entry and detainer issue, he may still bring an action for ejectment against the former defaulting owner who refuses to quit the land.[59] Being an action at law, it is normally brought in the circuit court. However, if the defendant (former owner) seeks to raise equitable defenses which could not be raised in a court of law, and there are other errors of jurisdiction, the case may be transferred to the chancery court.[60] The statute of limitation for bringing an action for writ of ejectment is ten years.[61]

When the new landowner pursues an action for ejectment, rather than the unlawful entry and detainer action, the question again arises as to the ownership of crops growing on the land issue. Because the crops were regarded as part and parcel of the realty, the old rule at common law was that one who recovered land in ejectment was entitled to the crops then growing on the recovered land.[62] This has been modified in Mississippi by

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to possession under an unlawful entry and detainer suit, was not a bar to the purchaser maintaining an action to confirm title as against the adverse claimant. *Id.* at 87.

[59] MISS. CODE ANN. §§ 11-19-1 to -105 (1972). *See also* Hytken v. Bianca, 186 Miss. 323, 330 (1939), 186 So. 624, 625 *reh'g granted*, 188 So. 311, 312 (1939)(section of code does not preclude equitable defense to action in ejectment).

[60] Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985). In *Hudson*, the Mississippi Supreme Court reversed the circuit court's granting of summary judgment for the appellee bank on grounds that there were material disputed facts before the trial court at the time of decision. *Id.* at 1239. The appellant asserted "fraudulent means" as his sole defense and requested, along with remand, a transfer to chancery from circuit court in order for his equitable defense to be heard. *Id.* The Mississippi Supreme Court, in remanding the case to Chancery, stated that where reversal is appropriate because of other errors independent of jurisdiction, the case should be remanded to the court which is best fitted to administer justice. *Id.* at 1240. *See* Thompson v. First Mississippi National Bank, 427 So. 2d 973, 975-76 (Miss. 1983)(circuit court's transfer of issue of punitive damages to chancery court denied plaintiff opportunity to litigate important substantive right and deprived plaintiff of right to trial by jury which was error other than as to jurisdiction; accordingly, judgment was reversed and case remanded to circuit court for trial on merits).

[61] MISS. CODE ANN. § 15-1-7 (1972).

[62] Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 757 (1889). In *Carlisle*, appellant, an ejected farmer, was denied the right to recover for his crops of cotton, corn, and fodder taken by appellee who had recovered the land from the appellant in an earlier ejectment action. *Id.* at 757. *See also* Harrod v. Burke, 87 Kan. 909, 92 P. 1128, 1129 (1907)(at common law, crops growing on land at time of recovery of land through ejectment are

statute:

> If the jury find for the plaintiff in an action of ejectment, and the defendant have a crop then planted and growing upon the premises in question, it shall assess a reasonable rent for the plaintiff to receive for the use of the premises, for such time as it may think necessary for the defendant to make and gather his crop. If the defendant enter into bond with security, to be approved by the court, or by the clerk in vacation, in a penalty of double the amount of rent so assessed, payable to the plaintiff, conditioned for the payment of the rent assessed at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then a writ of possession shall not issue upon the judgment in the action, until the expiration of the time so allowed by the jury. . . .[63]

Thus, in the hypothetical proposed, the FmHA would, under common law, have owned the growing crops upon foreclosure, but Roe would still have owned any matured or severed crops. However, as modified by Mississippi statute, Roe would actually own *all* the crops, but would be required to pay FmHA a reasonable rental for use of the land. However, since a mortgagor is entitled to possession until foreclosure, the rent would run only from the date of foreclosure and not from the date of default.[64] Roe's crops would still, however, be subject to liens cre-

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regarded as part of realty and pass to plaintiff in absence of evidence showing any right of severance in favor of other party). This rule rests on the proposition that, in law the defendant is regarded as a trespasser, and upon the theory that the crops still standing on the land and affixed to the soil are "part and parcel" of the land and are not personal property, therefore recovery of the land necessarily includes the crops. 21 AM. JUR. 2d *Crops* § 31 (1981).

[63] MISS. CODE ANN. § 11-19-87 (1972).

[64] MISS. CODE ANN. § 89-1-43 (1972). *See* Myers v. Hobbs, 100 F.2d 822, 824 (5th Cir. 1939)(rent not allowed until foreclosure and mortgagee is in rightful possession). *See also* Joiner v. Leflore Grocer Co., 145 Miss. 31, 48, 110 So. 857, 860 (1927)(purchaser at mortgage foreclosure sale is not entitled to rent for use of land prior to foreclosure, but only to reasonable rental for use of land after foreclosure.); Reiley v. Carter, 75 Miss. 798, 804, 23 So. 435, 436 (1898)(on judicial confirmation of foreclosure sale, title to all crops then unsevered passes to purchaser); Kessee v. Sloan, 69 Miss. 369, 370, 11 So. 731, 731 (1892)(purchaser of land at partition sale is entitled to rent falling due after purchase if not expressly reserved); Farmer's Loan & Trust Co. v. Avers, 67 Miss. 208, 7 So. 358, 358 (Miss. 1890)(before foreclosure, mere possession of trustee under deed of trust is insufficient to sustain action for conversion of crude turpentine taken from trees on land before trustee's possession was acquired).

ated by secured crop production loans as will be discussed next.

V. Priority of Crop Liens

Under the common law, crop liens were governed by the law of chattel mortgages. The general chattel mortgage rule was that if a crop mortgage was written to cover the crop year during which the advances were made as well as the following crop year or years (an "after-acquired property" clause), it was only an equitable mortgage as to the future years. Therefore, if the mortgagee refused to make future advances and the tenant mortgaged the later crop to another mortgagee for supplies to make a crop which otherwise would not have been made, then the later mortgage was granted priority.[65] The reason for giving priority to the later mortgage was because:

> . . . . [T]he merchant who furnished the supplies and advances to make the crop under the second deed of trust would have the higher or better equity, in that it was by his help and by his means that the crop was made and without which it might not have been made at all.[66]
>
> Chattel mortgage law has been supplanted by section 9-312(2) of the Uniform Commercial Code, a model provision which is now codified in Mississippi at section 75-9-312(2) of

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[65] Butler Merchantile Co. v. Cruise, 175 Miss. 200, 207, 166 So. 325, 326 (1936). In *Butler*, the appellee was unable to produce a 1930 crop on his lands without financial help for which he applied to appellant. *Id.* at 325. In return, the appellee executed a mortgage to appellant for all crops to be grown on his lands during 1930 and 1931. *Id.* Appellee had to apply for aid from appellant again in 1931 but was refused because appellant was going out of business. *Id.* Appellee then requested advances from Hymen Merchantile Co. which agreed to loan the appellee the necessary money. *Id.* Subsequently, Hymen Merchantile Co. assigned the indebtedness due it by the appellee to the First National Bank of McComb. *Id.* In determining which party had the rights to the 1931 crop, the Mississippi Supreme Court held that a valid crop mortgage could be given only in the crop grown during the year the advances were made and that if the mortgage purported to cover future crops, it was at most an equitable mortgage good between the parties and did not constitute a valid first lien. *Id.* at 326. *See* Coffey v. Land, 176 Miss. 114, 117, 167 So. 49, 51 (1936)(prior mortgage on crops of future year was only equitable and new mortgage was to be first in priority because without second merchant's financial help crop might never have been produced); Myers v. Hobbs, *supra* note 64, at 823-24 (Farm Credit Administration holding tenant's crop mortgage had priority in proceeds of crops raised by tenant over land mortgagor's claim because had FCA not come to tenant's aid there would have been no crops grown).

[66] *Coffey*, 176 Miss. at 117, 167 So. at 51.

the Mississippi Code. This section states:

> A perfected security interest in crops for new value given to enable the debtor to produce crops during the production season and given not more than three (3) months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six (6) months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.[67]

Thus, under section 75-9-312(2), a subsequent perfected security interest in crops takes priority over an earlier perfected security interest, but only if the following conditions are met:

1. The crop production security interest must be taken in exchange for new value;

2. The new value must be given "to enable the debtor to produce the crops during the production season";

3. The new value must be given "not more than three (3) months before the crops become growing crops by planting or otherwise"; and

4. The earlier security interest must be to secure an obligation which is more than six (6) months *overdue* at the time the crops become growing crops.[68]

The web becomes further tangled when future advances are involved. Subject in some cases to the UCC rules governing purchase money security interests and judicial process lien creditors, a creditor with a perfected security interest making a future advance takes priority as to the future advance over a subsequent creditor with a security interest perfected in the interim between the perfection of the first security interest and the fu-

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[67] *Id.* Codified in Mississippi as MISS. CODE ANN. § 75-9-312(2) (1972). *See also* United States v. Minster Farmer's Cooperative Exchange, Inc., 430 F. Supp. 566, 571 (N.D. Ohio 1977)(on action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached at same time, defendant's security interest was not entitled to priority under U.C.C. § 9-312 (2)).

[68] MISS. CODE ANN. § 75-9-312(2) (1972).

ture advance.[69] The only way, therefore, that the second creditor can protect itself is to search the UCC records for earlier filings and refuse to make a loan unless the debtor pays off the prior creditor or obtains a subordination agreement.[70] Notice that these UCC crop lien priority rules are the opposite of the law regarding future advances on real property. Under the law of real property in Mississippi, after actual notice of the attaching of a junior lien is provided, a senior mortgagee ordinarily will not be protected in making future advances under his mortgage given to secure such advances unless he was under a binding obligation to make them.[71]

Under the hypothetical proposed, the Farmers Bank meets the first three criteria of section 75-9-312(2). It also appears at first blush to meet the fourth. When it made its 1988 crop production loan in July of 1988, the note to PCA which was payable in January of 1988 was more than six months overdue. The problem is that it was not more than six months overdue at the time the 1988 crop became a "growing crop" in April of 1988. Therefore under the UCC, the Production Credit Association would maintain its first lienholder status as to the 1988 crop based on its "after-acquired property clause." However, as seen in the next section, the bankruptcy would in most circumstances, extinguish PCA's lien as to the 1988 crops.

VI. After-Acquired Property Clauses and Bankruptcy Law

With certain exceptions, section 552(a) of the Bankruptcy Code provides that property acquired by the debtor or the bankrupt estate after the filing of a petition in bankruptcy is not sub-

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[69] Miss. Code Ann. § 75-9-312(7) (1972).

[70] Miss. Code Ann. § 75-9-312(7) (1972). *See also* Miss. Code Ann. § 75-9-316 (1972)(persons entitled to priority of security interests may agree to subordination).

[71] North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412, 414 (1950). *See also* Ewing v. Krafft Co., 158 A.2d 654, 658 (Md. 1960)(lender subordinated to intervening lienors where lender had actual knowledge of intervening liens when he made additional optional advances); Riggs v. National Bank v. Welsh, 254 A.2d 172, 174 (Md. 1969)(voluntary advances made by senior lienor, with actual knowledge of intervening liens, rank behind those intervening liens); Heller v. Gate City Building and Loan Assoc., 408 P.2d 753, 755 (N.M. 1965)(first mortgagees, with actual knowledge of intervening liens making future optional advances cannot obtain priority for subsequent advances over intervening liens).

ject to any lien resulting from an after-acquired property clause in a security agreement entered into before the filing of the petition.[72] Simply stated, this provision nullifies any pre-petition liens to the extent they include any property acquired by the debtor after the filing of bankruptcy. Thus, if a farmer plants his crops before he files bankruptcy, then a perfected security interest, including an after-acquired property clause, would attach to the crops and proceeds of the crops realized post-petition. However, under most circumstances, a pre-petition security interest will not attach to crops planted after the debtor files for bankruptcy.[73] Even though section 552(a), in most circumstances, avoids a pre-petition security interest in property acquired by the debtor after filing bankruptcy, under section 552(b),[74] a creditor generally retains its security interest in post-petition proceeds, products, and offspring of property in which he acquired an interest prior to the commencement of the bankruptcy case.[75] Thus, the question to be answered under section 552(a) is whether the debtor planted his crops before or after filing his petition in bankruptcy. If planted after the bankruptcy petition was filed, then they are not subject to a lien created by a pre-

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[72] 11 U.S.C. § 552(a) (1976).

[73] *See, e.g., In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(creditor's otherwise properly perfected pre-petition future crop security interest extinguished regarding crops planted post-petition); *In re* Hardage, 69 Bankr. 681, 685 (Bankr. N.D. Tex. 1987)(crops subject to pre-petition security interest planted prior to commencement of bankruptcy proceeding are subject to attachment under creditor's post-petition liens); Hugo v. United States Farmers Home Admin., 50 Bankr. 963, 967 (Bankr. E.D. Mich. 1985)(discussing 11 U.S.C. § 552 which nullifies pre-petition liens to extent that they include after-acquired property of debtor).

[74] 11 U.S.C. § 552(b) (1976).

[75] *In re* Bohne, 57 Bankr. 461, 463 (Bankr. N.D. 1985). *See also* J. Catton Farms, Inc. v. First Nat'l Bank of Chicago, 779 F.2d 1242, 1246 (7th Cir. 1985)(where bank held perfected security interest which included farmer's crop proceeds, even if acquired after bankruptcy, these should be included as lender's security unless enforcement is deemed inequitable); *In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(properly perfected pre-petition future crop security interest of Farmers' Home Administration did not attach to crop planted post-petition); *In re* Oliver, 66 Bankr. 426, 428 (Bankr. N.D. Tex. 1986)(creditors entitled to debtor's post-petition rental income for crops grown by third party lessee on leased farmland where creditors possessed secured pre-petition liens); *In re* Pigeon, 49 Bankr. 657, 659 (Bankr. N.D. 1985)(creditors retain under 11 U.S.C. § 552(b) interest in proceeds and property acquired prior to debtors commencement of bankruptcy proceedings).

petition after-acquired property clause. If planted before the petition was filed, then they are subject to the pre-petition security interest. The question to be answered under section 552(b) is who has rights in proceeds acquired by the debtor's estate post-petition from the disposition of property acquired pre-petition.[76] In order to prevail under section 552(b), the creditor with a pre-petition security interest must be able to show that proceeds from the sale of pre-petition crops have been used to finance post-petition crops.[77]

Even assuming the crop was planted pre-petition and the after-acquired property clause attaches a security interest thereto, if the crop was planted within ninety (90) days of the filing of the bankruptcy, the security interest can be avoided under section 547[78] as a preferential transfer.[79] If a security interest attaches to crops planted pre-petition, the value of the security interest is not cut off by section 552(a) and, therefore, determined as of the date of the filing of the petition in bankruptcy. The value of the security interest is equal to the full value of the harvested crop.[80] However, under section 506(c)[81] of

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[76] *In re* Lorenz, 57 Bankr. 734, 736 (Bankr. N.D. Ill. 1986)(bank's security interest did not extend to cash proceeds generated by 1985 crop planted after debtor filed for bankruptcy).

[77] *Hugo*, 50 Bankr. at 967. *See* MISS. CODE ANN. § 75-9-306 (1972)(defining proceeds as receipts received upon sale, exchange, or other disposition of collateral or proceeds).

[78] 11 U.S.C. § 547 (1976). This section updates the preference provisions bringing them into conformity with the Uniform Commercial Code. *Id.* Preferences are described in pertinent part:

> [T]he trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while debtor was insolvent; (4) made - (A) on or within 90 days before the date of the filing of the petition . . .; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. § 547(b).

[79] *See, e.g., In re* Lemley Estate Business Trust, 65 Bankr. 185, 189-90 (Bankr. N.D. Tex. 1986)(crop planted within 90 day time frame of 11 U.S.C. § 547(b) so FDIC forbidden to recover crop proceeds because recovery would constitute preference under § 547(b)).

[80] *See, e.g., In re* Randall, 58 Bankr. 289, 291 (Bankr. Ill. 1986).

[81] 11 U.S.C. § 506 (1976). The trustee may recover from property securing an allowed secured claim the reasonable necessary costs and expenses of preserving, or dispos-

the Bankruptcy Code, the debtor is entitled to deduct the costs of maintaining, harvesting and marketing the crops.[82]

In the hypothetical proposed, since Roe planted his 1988 crops subsequent to filing his petition in bankruptcy, the after-acquired property clause in PCA's 1987 financing statement does not create a lien in favor of PCA against his 1988 crops. However, if Roe used any proceeds from his 1987 crops to finance his 1988 crops, PCA would have a lien against his 1988 crops to the extent of the 1987 proceeds used.

VII. Conclusion

In today's volatile farm economy, farm failures and bankruptcies are commonplace. Because the law of real property, UCC crop liens, and bankruptcy all apply and may sometimes conflict, the rights of the farmer, land purchase lender, and crop production lender are oftentimes difficult to sort out. The basic rules, however, are that the beneficiary under a foreclosed deed of trust may remove a farmer holding over from the land under either the summary process of forcible entry and detainer or writ of ejectment. Crops growing at the time of ejectment still belong to the farmer and he may re-enter the land to finish cultivation and harvesting of his crops as long as he pays a fair rental (forcible entry and detainer) or posts a bond double the rent (ejectment).

A lender making a loan for crop production should first search the UCC filings and require the farmer either to pay off all earlier crop loans or obtain a subordination agreement. Failing this, the lender should make sure that the loan complies with the requirements of the UCC provisions set out in section 75-9-312(2) of the Mississippi Code. Most importantly, the lender should be aware that his crop production loan will not take priority over an earlier crop production loan with an "after-acquired property" clause unless the earlier loan is at least six months overdue at the time the crops become "growing" crops.

Finally, both lenders and farmers should be aware that a

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ing of such property to the extent of any benefit of the holder of such claim. *Id.* § 506(c).

[82] *Id.*

security interest in crops created by a security agreement with an after-acquired property clause is cut-off by the farmer filing bankruptcy. Thus, if a farmer is contemplating bankruptcy and continued operations afterwards, it would be in his best interest to file bankruptcy first and then plant his crops. If the farmer, however, uses proceeds from a crop harvested prior to filing bankruptcy to finance crops planted after filing bankruptcy, creditors' pre-petition liens will attach to his post-petition crops and proceeds.

1988 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

During 1988, the Mississippi Supreme Court rendered twenty-nine decisions in the area of administrative law. This review, however, will present only those decisions which have either expanded, clarified or changed existing law. Among the topics covered by these decisions but not receiving textual treatment are professional misconduct,[1] employment,[2] taxes,[3] police power,[4] elections,[5] mineral leases,[6] statutes,[7] disa-

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[1] *See* Stewart v. Walls, 534 So. 2d 1033, 1035 (Miss. 1988) (in legal malpractice action, plaintiff must prove that "but for" attorney's negligence, he would have been successful in his earlier action or defense); Jennings v. Mississippi State Bar, 533 So. 2d 443, 444 (Miss. 1988) (burden of proving entitlement to reinstatement from disbarment is on petitioner, who must show rehabilitation and further compliance with jurisdictional requirements of Rule 12 of Rules of Discipline); Mississippi State Bar Ass'n v. Young, 523 So. 2d 323, 324 (Miss. 1988) (where suspended attorney fails to file petition for rehearing and judgment becomes final, subsequent petition to modify order of suspension will be regarded as petition for reinstatement, which under MISS. R. DISCIPLINE 12.4 cannot be filed until after expiration of period of suspension).

[2] *See* City of Jackson v. Froshour, 530 So. 2d 1348, 1355 (Miss. 1988) (order of Civil Service Commission compelling discharge of police officer will be upheld where such determination is supported by substantial evidence); City of Picayune v. Mississippi Employment Sec. Comm'n, 525 So. 2d 1330, 1333 (Miss. 1988) (where employee regularly violates clearly announced and published employment policy, employee is guilty of misconduct as matter of law and is not eligible for unemployment benefits).

[3] *See* McGowan v. Marx, 537 So. 2d 426, 430 (taxpayers involved in business of providing oil field services must include in gross income recovery of cost of personal property used and consumed in providing such taxable service); Morco Industries, Inc. v. City of Long Beach, 530 So. 2d 141, 145 (Miss. 1988) (court held that legislature intended to divest state subdivisions of any authority to tax those entitled to exemption under MISS. CODE ANN. § 57-3-33 (1972)).

[4] *See* Mississippi State Highway Comm'n v. E. F. Hale & Hale Lumber Co., 531 So. 2d 623, 625-26 (Miss. 1988) (Mississippi State Highway Commission has power to make regulations controlling traffic upon and entering highways, including regulation and restriction of private driveways, where such regulations are reasonable and impartial).

bility benefits,[8] and actions of various administrative bodies.[9] Cases receiving textual treatment encompass the following areas: workers' compensation, attorney and judicial misconduct, election contests, tax refunds and eminent domain.

I. WORKERS' COMPENSATION

The Mississippi Supreme Court handed down several decisions during 1988 clarifying rights with regard to disability benefits. To begin with, in *Stuart's, Inc. v. Brown*,[10] the Mississippi Supreme Court addressed the issue of whether a pre-existing injury should be taken into consideration in determining benefits awardable to an employee who is injured while on the job.[11] While recognizing that certain pre-

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[5] *See* Rizzo v. Bizzell, 530 So. 2d 121, 126 (Miss. 1988) (although election commissioners sit as advisors in election contests to determine facts, special judge is "controlling judge" of both facts and law); Leigh v. Board of Supervisors, 525 So. 2d 1326, 1328 (Miss. 1988) (propositions to be submitted to voters are not multi-propositional where they relate to only one subject and purpose and therefore fall within the purview of MISS. CODE ANN. § 19-3-55 (1972)).

[6] *See* Wright v. State Oil and Gas Bd., 532 So. 2d 567, 572-74 (Miss. 1988) (drilling units of different depths are considered separate and distinct drilling units even though drilled by same well, such that under MISS. CODE ANN. § 53-3-7(a) (1972), non-consenting owner of leasehold interest is chargeable only for costs of particular unit that is productive).

[7] *See* Grant Center Hospital v. Mississippi Health Care Comm'n, 528 So. 2d 804, 810 (Miss. 1988) (court may examine subsequent legislative amendments to ascertain meaning of prior statute, especially where amendments clarify prior statute in accordance with interpretation and enforcement given it by administrative agency charged with its implementation).

[8] *See* Amoco Production Co. v. Murphy, 528 So. 2d 1123, 1124 (Miss. 1988) (to qualify as employee of subcontractor for purposes of obtaining benefits from contractor under MISS. CODE ANN. § 71-3-7 (1972), subcontractor must be one who contracts to perform act with another who already has obligation to perform such act); Robinson v. Packard Electric Div., 523 So. 2d 329, 332 (Miss. 1988) (Commission's denial of permanent disability benefits must be supported by substantial evidence to be upheld).

[9] *See* Penick v. Mississippi Comm'n on Natural Resources, 533 So. 2d 179, 181 (Miss. 1988) (Environmental Protection Agency regulations require that operator of facility handling hazardous waste obtain permit to operate and permit must be signed by both operator and owner of such facility); South Central Turf, Inc. v. City of Jackson, 526 So. 2d 558, 561 (Miss. 1988) (appeals from decisions of municipal authorities not involving issuance or sale of bonds is within exclusive jurisdiction of circuit court); State *ex rel.* Pittman v. Mississippi Public Serv. Comm'n, 538 So. 2d 387, 399 (Miss. 1989) (Mississippi Public Service Commission's use of company's actual capital structure to arrive at its rate of return was proper where Commission examined and considered testimony of expert witnesses which provided substantial basis for use of such structure).

[10] No. 58,140 (Miss. Dec. 7, 1988).

[11] *Brown*, No. 58,140, slip op. at 1. Nellie W. Brown, an employee of Stuart's, Inc. in

existing disabilities require a reduction of compensation otherwise payable,[12] the court distinguished between occupational and medical (or physical) disabilities and explained that physical disabilities have relevance within the compensation law only insofar as they relate to and cause occupational disability.[13] The court, therefore, concluded that pre-existing physical disabilities generate a duty to apportion only where those physical disabilities have produced in the claimant a pre-existing occupational disability.[14]

The Mississippi Supreme Court in *Fought v. Stuart C. Irby Co.*[15] limited an employee's recovery of benefits with regard to mental injuries. In *Fought*, an employee sought benefits for permanent psychiatric disability allegedly stemming from unrealistic work assignments, unjust pressure and job harassment at her place of employment.[16] In its

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Tupelo, attempted to prevent a shoplifting and was beaten so severely that she was rendered unconscious. *Id.* As a result, Brown became permanently, totally disabled and brought a worker's compensation claim against her employer and its carrier. *Id.* The employer and carrier sought apportionment, arguing that Brown's disability in substantial part was related to pre-existing back trouble and an earlier car wreck. *Id.*

[12] *Id.*, slip op. at 2. *See*, Reichhold Chemical, Inc. v. Sprankle, 503 So. 2d 799, 803 (Miss. 1987) (Commission must apportion injury between pre-existing condition and work-related injury).

[13] *Brown*, No. 58,140, slip op. at 3. *See* Marshall Durbin, Inc. v. Hall, 490 So. 2d 877, 881 (Miss. 1986) (court noted distinction between occupational and physical disabilities and determined that apportionment may not be employed to deprive injured worker of benefits where sole evidence supporting apportionment is that injured worker had pre-existing asymptomatic degenerative condition).

[14] *Brown*, No. 58,140, slip op. at 3. At the hearing before the Worker's Compensation Commission, it was found that Brown's total, permanent disability was solely a result of the job-related injury. *Id.* slip op. at 4. In its opinion, the Mississippi Supreme Court found that, despite evidence that Brown suffered from preexisting physical disabilities, the record supported a finding of fact that Brown had experienced no preexisting occupational disability as she was able to work despite preexisting back troubles until the occurrence of the work-related injury. *Id.* Accordingly, the court determined that the Commission's findings were not clearly erroneous or contrary to the overwhelming weight of the evidence and, therefore, upheld the Commission's order denying apportionment. *Id.*

[15] 523 So. 2d 314 (Miss. 1988).

[16] *Fought*, 523 So. 2d at 316. Elza Fought was employed by the Stuart C. Irby Company to perform certain office-clerical duties in the residential lighting fixtures department in its Vicksburg store. *Id.* at 315. In May 1981, Michael Vail became manager of the Vicksburg store and gave Fought new responsibilities, including assembling and hanging a certain number of fixtures per week, repairing or replacing damaged fixtures and devising a plan to bring up sales or reduce inventory. *Id.* That some month, Fought resigned and on March 8, 1982, filed her motion to controvert seeking benefits for permanent psychiatric disability allegedly caused by stress from her employment. *Id.* at 316. The Workers' Compensation Commission determined that Fought had failed to establish

opinion, the court stated that while under appropriate circumstances an employee can be compensated for mental/nervous injuries not immediately caused by physical trauma,[17] the law does not compensate disability attendant upon the general stress of the work-place.[18] The court concluded that in order for a mental injury unaccompanied by physical trauma to be compensable it must have been caused by something more than ordinary incidents of employment.[19]

Besides limiting benefits available to an injured employee in workers' compensation cases, the Mississippi Supreme Court in *Sturgis v. International Paper Co.*[20] also clarified the limitation placed on the credit available to an employer for wages or compensation paid to an employee during the disability period.[21] The court stated that section 71-3-37 (11) of the Mississippi Code grants an employer credit where such employer has made advance payments of compensation to an injured employee.[22] The court, however, distinguished between compen-

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the requisite work connection between her employment and her disability. *Id.* Instead, the Commission found that Fought's mental disability was attributable to a preexisting personality disorder, which was further exacerbated by severe trauma (alleged molestation of Fought's grandchild) unrelated to her employment. *Id.* at 317. Additionally, the Commission found that the employer's management policy was not unreasonable or unfair. *Id.* The Circuit Court of Warren County affirmed the Commission's findings, and Fought appealed. *Id.*

[17] *Id.* at 318 (citing Brown & Root Construction Co. v. Duckworth, 475 So. 2d 813, 815 (Miss. 1985)).

[18] *Id.* The court explained that benefits may be available only if an employee experiences a series of identifiable and extraordinary stressful work connected incidents. *Id.*

[19] *Id.* at 317. The court determined that the stresses or harassments which Fought complained of were nothing more than ordinary incidents of employment and not unusual or untoward events or occurrences. *Id.* at 318. In addition, the court held that the record supported the Commission's finding that Fought's mental disorder preceded her employment. *Id.* Having found that the Commission's findings were supported by substantial evidence and were not in clear error, the court, therefore, affirmed the Commission's order. *Id.* at 319.

[20] 525 So. 2d 813 (Miss. 1988).

[21] *Sturgis*, 525 So. 2d at 815. Homer Sturgis, an employee of International Paper (IP) was injured on the job on November 6, 1980. *Id.* at 814. From November 6, 1980 until January 20, 1981, IP paid Sturgis compensation benefits of $98.00 per week. *Id.* Sturgis returned to work in February 1981, and worked until February 1982. *Id.* The Workers' Compensation Commission found Sturgis entitled to total disability benefits of $98.00 per week beginning November 6, 1980 and continuing from a period not to exceed 450 weeks with proper credit for wages earned by claimant or compensation paid by the employer during this period. *Id.* On appeal, the Circuit Court of Adams County reversed the order of the Commission, and Sturgis appealed. *Id.*

[22] *Id.* Section 71-3-37 (11) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." MISS. CODE ANN. § 71-3-37 (11) (Supp.

sation and wages paid,[23] explaining that the amount of credit due an employer is not the amount of wages or earnings paid, but the amount of compensation due for the particular period.[24] The court, therefore, denied an employer credit in excess of the compensation payable to an injured worker.[25]

Finally, in *Griffin v. Futorian*,[26] the Mississippi Supreme Court addressed the issue of when benefits provided by the Workers' Compensation Act shall constitute an injured employee's exclusive remedy against his employer. In *Griffin*, an employee, who had been injured while operating a sawing machine at a furniture plant, brought a tort action against his employer after having received compensation for his injuries under the Workers' Compensation Act.[27] The employee claimed that his injuries constituted a new tort outside the exclusivity rule of the Mississippi Workers' Compensation law found in section 71-3-1 of the Mississippi Code.[28] The court, however, explained that in

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1988).

[23] *Sturgis*, 525 So. 2d at 815. The court explained that compensation is defined in MISS. CODE ANN. 71-3-3 (j) (Supp. 1988) as the money allowance payable to an injured worker or his dependents, including funeral benefits. *Sturgis*, 525 So. 2d at 815.

[24] *Sturgis*, 525 So. 2d at 815. The court cited LARSON, WORKMEN'S COMPENSATION LAW, 57.47 which explains:

> [i]f the wage paid was $200, and if the compensation due for the week was $150, the credit is for $150 only. In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability.

Sturgis, 525 So. 2d at 815.

[25] *Sturgis*, 525 So. 2d at 815. Having found that the Commission had substantial evidence to support its factual determination, the Mississippi Supreme Court reversed the circuit court and reinstated the order of the Commission. *Id.* Accordingly, the court determined that the proper credit due IP was $98.00 per week for the number of weeks Sturgis continued to work after his injury and not the total of his earnings for the weeks worked. *Id. See* South Central Bell Telephone Co. v. Aden, 474 So. 2d 584, 596 (Miss. 1985) (court limited credit to amount of compensation payable to injured employee).

[26] 533 So. 2d 461 (Miss. 1988).

[27] *Griffin*, 523 So. 2d at 462. On February 8, 1983, James S. Griffin, an employee of Futorian Corporation in Eupora, Mississippi, slipped on an accumulation of sawdust while operating a large lumber sawing machine and fell into the saw which severed most of his right hand and mangled his right arm. *Id.* Griffin filed for Workers' Compensation benefits and received a lump-sum settlement. *Id.* Several months later, Griffin returned to work and on September 2, 1983, he again slipped on the sawdust and fell into the saw, severely injuring his left hand. *Id.* Griffin again was granted compensation for the injury to his left hand. *Id.* In September 1988, Griffin filed a tort action against Futorian and George Faulk, the corporate manager, for the injuries sustained from both accidents. *Id.*

[28] *Id.* at 463. The Circuit Court of Webster County granted summary judgment in favor of Futorian and Faulk, ruling that Griffin's claim was barred by the exclusivity rule of the Mississippi Worker's Compensation Act in MISS. CODE ANN. § 71-3-1 (Supp. 1988).

order for an injured employee to avoid the exclusivity provision two elements must be present: (1) the injury must have been caused by the willful act of another employee acting in the course of employment and in the furtherance of the employee's business, and (2) the injury must be one that is not compensable under the Act.[29] Having found that the employer's actions were not done with an intent to injure the employee[30] and that the injury arose out of and in the course of the employment such that it was compensable under the Act, the court concluded that the employee's exclusive remedy was the benefits provided for under the Workers' Compensation Act.[31]

II. Attorney and Judicial Misconduct

The Mississippi Supreme Court rendered four significant decisions with regard to disciplinary sanctions for misconduct of attorneys and judges. First, in *Mississippi State Bar v. Edwins*,[32] the court held that under Rule 13 of the Rules of Discipline for the Mississippi State Bar, disciplinary sanctions imposed upon an attorney in another jurisdiction shall be conclusive evidence in Mississippi of the guilt of the unprofessional conduct on which such sanction was ordered.[33] In that

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Griffin, 533 So. 2d at 462. Section 71-3-1 provides in pertinent part:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death. . . .

Miss. Code Ann. § 71-3-1 (Supp. 1988).

[29] *Griffin*, 533 So. 2d at 463 (citing Miller v. McRae's Inc., 444 So. 2d 368, 371-72 (Miss. 1984)).

[30] *Griffin*, 533 So. 2d at 464. *See* Dunn, Mississippi Workmen's Compensation, § 22 (3d ed. 1982 and Supp. 1984) (in order for willful tort to be outside exclusivity of Act, employer's actions must be done with actual intent to injure employee).

[31] *Griffin*, 533 So. 2d at 464. The court also held that George Faulk was acting within the scope of his employment and was, therefore, also immune from suit as the exclusiveness of the Act protected him as well as Futorian. *Id.* Accordingly, the judgment of the lower court was affirmed. *Id.*

[32] 534 So. 2d 218 (Miss. 1988).

[33] *Edwins*, 534 So. 2d at 219. Rule 13 of the Rules of Discipline for the Mississippi State Bar provides:

> When an attorney should be subjected to disciplinary sanctions in another jurisdiction, such sanction shall be grounds for disciplinary action in this state, and certification of such sanction by the appropriate authority of such jurisdiction to the Executive Director of the Bar or to the Court, shall be conclusive evidence of the guilt of the offense or unprofessional conduct on which said sanction was ordered, and it will not be necessary to prove the grounds for

case, the Mississippi State Bar (MSB) brought a formal complaint against Rallie C. Edwins, a Mississippi resident and member of the MSB, based upon unprofessional and unethical conduct occurring in Louisiana for which his license to practice law in that state had been suspended for two years.[34] In holding that the findings of the Supreme Court of Louisiana were conclusive evidence of Edwin's guilt of the offenses charged, the Mississippi Supreme Court stated that the sole issue left for its determination was the extent of the final discipline to be imposed.[35] Although not bound by the Louisiana disposition,[36] the court found Louisiana's action to be persuasive and imposed a like sanction on Edwins of two years suspension from the practice of law in the State of Mississippi.[37]

In *Goeldner v. Mississippi State Bar Association*,[38] the Mississippi Supreme Court expounded upon its ultimate authority in proceedings involving attorney discipline. In *Goeldner*, the Mississippi State Bar Complaint Tribunal had determined that an attorney, Christian T. Goeldner, had fraudulently padded legal time spent working on a case for a client and had willfully misrepresented the amount of fees due.[39] Based on these findings the Tribunal ordered that the attorney

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> such offense in the disciplinary proceedings in this state. The sole issue to be determined in the disciplinary proceeding in this state shall be the extent of the final discipline to be imposed on the attorney, which may be less or more severe than the discipline imposed by the other jurisdiction.

MISS. R. DISCIPLINE, Rule 13 (1983).

[34] *Edwins*, 534 So. 2d at 218-19. Edwins had been found guilty in Louisiana of violations of the Rules of Discipline in a matter arising out of his handling of two workers' compensation claims. *Id.* at 219. Edwins' violations involved inaccurate and incomplete accounting of the disbursement of settlement funds, improper accounting of funds, fees charged in excess of the amount permitted under the Worker's Compensation statute, and the commingling of client and personal funds. *Id.* (citing Louisiana State Bar Association v. Edwins, 519 So. 2d 93 (La. 1988)).

[35] *Id.* The court stated that the filing of a certified copy of the final decision of the Supreme Court of Louisiana with the clerk of this court was sufficient to activate Rule 13. *Id.* Additionally, the court determined that Edwins had received full due process in Louisiana. *Id.*

[36] *Id. See* Mississippi State Bar v. Young, 509 So. 2d 210, 219 (Miss. 1987) (Mississippi Supreme Court is not bound by another court's disposition of disciplinary sanctions).

[37] *Edwins*, 534 So. 2d at 220. In deciding on a two year suspension, the court took into consideration the fact that Edwins was not a first offender, but had been suspended in Louisiana for thirty days for making cash advances to a client and for ninety days for soliciting employment. *Id.* at 219 (citing Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976); Louisiana State Bar Ass'n v. Edwins, 519 So. 2d 93, 102 n.27 (La. 1988)).

[38] 525 So. 2d 403 (Miss. 1988).

[39] *Goeldner*, 525 So. 2d at 404. Goeldner had been hired by Eugene F. Miller to

be disbarred.[40] In its review of the record, the Mississippi Supreme Court found that the Mississippi State Bar had established by clear and convincing evidence each act of misconduct necessary to support the Tribunal's findings.[41] The court, however, clarified the point that the supreme court is the supreme trier of fact and is not bound by any findings of fact by a Complaint Tribunal, but may review such findings and give them such merit as they may deserve.[42] As to the discipline imposed by the Tribunal, the court further explained that it has independent authority to reassess the punishment imposed in disciplinary proceedings and to modify such as it deems proper.[43] Having found disbarment too severe for the misconduct involved, the court vacated the order of the Tribunal and ordered instead a two year suspension.[44]

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recover assets belonging to Miller's aunt-in-law, Florence Middleton. *Id.* Miller agreed to pay Goeldner at the rate of $100 per hour. *Id.* Goeldner opened a file entitled "Miller Re: Middleton - an estate matter" and assigned the file the number 500-84001. *Id.* Although Goeldner was successful in the suit to recover Mrs. Middleton's assets, Chancellor Dennis Baker reduced Goeldner's fee from the agreed upon $100 per hour to $60 per hour. *Id.* Goeldner then submitted a bill for his legal services for file number 500-84001 which totaled $9,910.32 for work performed at $60 per hour. *Id.* Miller compared some of the bills previously submitted by Goeldner and discovered that although the rate of pay as ordered by the Court was considerably lower, the total of each of the two bills was nearly equal. *Id.* Miller and Chancellor Baker filed complaints with the Mississippi State Bar alleging that Goeldner had padded the time he spent on the Middleton matter. *Id.* Goeldner then presented for the first time an account labeled "Miller Re: Conservatorship," file number 900-84001. *Id.* at 405. The Complaint Tribunal of the Mississippi State Bar determined that Goeldner fabricated the second file and the billing hours in respect thereto. *Id.* at 405.

[40] *Id.* at 406. The Tribunal determined that Goeldner's conduct amounted to a violation of the Disciplinary Rules of the Code of Professional Responsibility of the Mississippi State Bar, including rules DR1-102 (A) (1, 4, 5 and 6), DR2-106(A), and DR7-102(A) (3, 4, 5, and 6). *Goeldner*, 525 So. 2d at 406. In addition, the Tribunal found that Goeldner had violated the duties of an attorney as set forth in MISS. CODE ANN. § 73-3-35 (Supp. 1985). *Goeldner*, 525 So. 2d at 406.

[41] *Goeldner*, 525 So. 2d at 407. The court determined that a careful examination of the two accounts revealed that Goeldner had charged both accounts with the same work. *Id.* at 406.

[42] *Id. See* Myers v. Mississippi State Bar, 480 So. 2d 1080, 1093 (Miss. 1985) (Mississippi Supreme Court is trier of fact in bar disciplinary proceedings and can make findings contrary to those of tribunal). *See also* MISS. CODE ANN. § 73-3-329 (5) (Supp. 1982) (court may review findings of complaint tribunal and may make such findings and render such order as it may find to be appropriate).

[43] *Goeldner*, 525 So. 2d at 407 (citing Vining v. Mississippi State Bar Ass'n, 508 So. 2d 1047 (Miss. 1987)).

[44] *Id.* The court explained that there is no standard as to what punishment a particular misconduct deserves. *Id.* Rather, disciplinary sanctions must be determined on a case-by-case basis. *Id. See* A Mississippi Attorney v. Mississippi State Bar, 453 So. 2d

The Mississippi Supreme Court in *Inquiry Concerning Baker*[45] was called upon for the first time to interpret section 177A of the Mississippi Constitution and Canon 7 of the Code of Judicial Conduct in order to determine when judicial misconduct in violation of such provisions calls for a public reprimand as opposed to a private one. The Mississippi Commission on Judicial Performance (Commission) filed a formal complaint against Chancellor Dennis M. Baker for having telephoned a litigant who was involved in an action pending before the chancellor and for having solicited his political support in an upcoming election.[46] The Commission found by clear and convincing evidence that Baker had violated Mississippi Constitution section 177A and Canon 7 of the Code of Judicial Conduct, and recommended public reprimand.[47] In its review of the case, the Mississippi Supreme Court stated that recent Mississippi judicial disciplinary cases reveal that the sanction of public reprimand is normally imposed only when there has been

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1023, 1028 (Miss. 1984) (court recognized there were no standards for punishment and vacated 45-day suspension and ordered private reprimand).

[45] 535 So. 2d 47 (Miss. 1988).

[46] *Baker*, 535 So. 2d at 48. Judge Baker had presided over the divorce of Judy and John Grantham in September of 1984. *Id.* In March of 1986, John Grantham filed a petition for modification of the divorce settlement, and Judy cross-filed. *Id.* The hearing there-on was orally continued until June 4, after the upcoming judicial election. *Id.* The continued case was not docketed, and the only record of the continuance was the transcript of the record. *Id.* at 49. During the continuance, the judge telephoned Grantham, asking him for his support in the election. *Id.* The judge claimed that he had forgotten about the pending litigation involving Grantham and contended that the impropriety of his action was not willful, but inadvertent. *Id.* at 53. Grantham understood the call to mean that his political support would result in a favorable outcome in the litigation, but no evidence was adduced that the judge ever said that political support would result in a favorable resolution of the case. *Id.* at 52.

[47] *Id.* at 47-48. MISS. CONST. art. VI, § 177A (1979), provides in part: "On recommendation of the commission on judicial performance, the Supreme Court may remove from office, suspend, fine or publicly censure or reprimand any justice or judge of this state for:. . . (e) conduct prejudicial to the administration of justice which brings the judicial office into disrepute. . . ." Canon 7 of the Code of Judicial Conduct of Mississippi Judges provides in part:

> A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.
>
> B. Campaign Conduct.
>
> (1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election;
>
> (a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;. . .

CODE OF JUDICIAL CONDUCT OF MISS. JUDGES, Cannon 7.

more than one offense.[48] The court could find no case in which one isolated instance of impropriety warranted public censure.[49] Accordingly, the court held that due to the isolated nature of the incident, its inadvertence and the fact that it did not involve moral turpitude, and in light of the judge's long career of public service, a private and not a public reprimand was in order.[50]

Finally, in *Gibson v. Mississippi State Bar*,[51] the Mississippi Supreme Court set forth the procedures to be followed when an attorney seeks reinstatement to practice law following disciplinary sanctions.[52] The court held that Rule 12 of the Rules of Discipline for the Mississippi State Bar controls the procedure of the request for reinstatement.[53] The court, therefore, determined that a tribunal must be convened to conduct a hearing on a petition for reinstatement.[54] In addition, the court declared that the tribunal must follow the proce-

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[48] *Baker*, 535 So. 2d at 53. The court cited thirteen cases in an appendix to this case and concluded from those cases that public reprimand was appropriate only where there has been more than one offense or where there has been more than one violation of the same type of offense. *Id.*

[49] *Id.*

[50] *Id.* at 54. In reaching its decision, the court took into consideration affidavits of the Chancery Clerks of Tate, DeSoto, Panola, Grenada, Yalobusha and Montgomery Counties, all of which attested to Judge Baker's proper conduct of court, professionalism, fairness and efficient handling of heavy caseloads. *Id.* The court stated that while Judge Baker's act of telephoning Grantham while his case was pending was improper, such conduct under the circumstances of this case did not warrant public reprimand according to its interpretation of MISS. CONST. art. VI, § 177A and Cannon 7. *Id.*

[51] 531 So. 2d 800 (Miss. 1988).

[52] *Gibson*, 531 So. 2d at 800. Billy R. Gibson was suspended from the practice of law in Mississippi for six months on July 12, 1985. *Id.* He then transferred to disability inactive status due to a mental illness and excessive consumption of alcoholic beverages. *Id.* In this action, Gibson petitioned the court for reinstatement, claiming that his manic depressive disorder was treatable and that he has effectuated a complete recovery from his problems. *Id.* The Mississippi State Bar filed an answer, asserting that it lacked sufficient information to admit or deny Gibson's allegations of rehabilitation and requested that a Master Tribunal be appointed to hear and consider the issues of reinstatement. *Id.*

[53] *Id.* Rule 12 of the Rules of Discipline for the Mississippi State Bar provides in pertinent part:

> (12.8) Board of Bar Commissioners. Upon receipt of the reinstatement petition, the Court shall allow the Board of Bar Commissioners a reasonable time to conduct an investigation and answer the petition. After filing of pleadings or notice on behalf of the Bar, the proceeding shall continue, if necessary or desirable, as the Court may direct and the Court, in its discretion, may grant or deny the petition as circumstances and justice require.

RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR, Rule 12 (1983).

[54] *Gibson*, 531 So. 2d at 801.

dures, powers and duties of Rule 8 of the Rules of Discipline with the exception that the petition for reinstatement be considered rather than the suspension or disbarment of an attorney.[55] Furthermore, the court stated that at the conclusion of the hearing, the tribunal must report its findings and recommendations for the court's final consideration.[56]

III. Election Contests

In 1988, the Mississippi Supreme Court rendered two significant decisions in the area of election contests. First, in *Foster v. Harden*,[57] the Mississippi Supreme Court overruled prior precedent and held that circuit courts have no subject matter jurisdiction to hear election contests involving candidates' qualifications for service in the legislature.[58] In *Foster*, a duly qualified Democratic candidate for the Mississippi Senate from Hinds County filed a petition to contest the 1987 primary election, claiming that her opposing candidates were not actual residents of the district for two years prior to the election as required by article 4, section 42 of the Mississippi Constitution.[59] The Circuit

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[55] *Id.* Rule 8 of the Rules of Discipline for the Mississippi State Bar provides in pertinent part:

> (a) All formal complaints shall be filed with the clerk of the Court and the Court shall designate a Complaint Tribunal to hear and determine the matter. Hearings before Complaint Tribunals shall be as cases in chancery.
>
> (8.1) Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.
>
> (8.5) Trials shall be held in the attorney's county of residence; provided, upon written waiver by the attorney or upon motion made by either party and order by the Tribunal, trial may be held elsewhere. The presiding judge or his designee may hear all pre-trial motions and enter all appropriate pre-trial orders. Trial upon the merits shall be held before the full Tribunal. Trials shall be held as expeditiously as possible and the presiding judge may schedule pre-trial conferences for all purposes.

Rules of Discipline for the Mississippi State Bar, Rule 8 (1983).

[56] *Gibson*, 531 So. 2d at 801.

[57] 536 So. 2d 905 (Miss. 1988).

[58] *Foster*, 536 So. 2d at 907. The court overruled Gadd v. Thompson, 517 So. 2d 576, 579 (Miss. 1987), which had held that residency qualifications under Miss. Const. art. IV, § 42 were proper subject matter for a special tribunal in an election contest hearing. *Foster*, 536 So. 2d at 907. The court noted that in *Gadd*, the issue of § 38 of the Mississippi Constitution was not raised, nor was the issue of jurisdiction discussed in the majority opinion. *Id.*

[59] *Foster*, 536 So. 2d at 906. Velvelyn B. Foster properly qualified as a Democratic

Court of Hinds County dismissed the petition for lack of subject matter jurisdiction.[60] In its analysis, the Mississippi Supreme Court stated that section 38 of the Mississippi Constitution provides unambiguously that each house of the legislature "shall judge of the qualifications, return and election of its own members."[61] The court explained that each legislative body is the *sole* judge of the elections and qualifications of its members so that the question of a candidate's residency qualifications for the Senate seat under section 42 of the Mississippi Constitution must be determined by the Senate.[62] Recognizing that questions of law are normally only considered in the courts and that section 42 of the Mississippi Constitution is a rule of law, the court, nevertheless, held that judicial competence may not extend to questions of law when the decision of such has been constitutionally placed somewhere else.[63] Having found that section 38 of the Mississippi Constitution vests competence of Senate residency requirements in the Senate itself, the court determined that the judiciary had no subject matter jurisdiction

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candidate for the Mississippi Senate from District 28, Hinds County, for the primary election held on August 4, 1987. *Id.* The Democratic Executive Committee (Committee) certified Earl S. Banks and Alice Hardin as candidates in the run-off election held on August 25, 1987. *Id.* Foster filed a sworn petition with the Committee to contest the election, alleging that Banks and Harden fraudulently qualified to seek election in that said candidates were not actual residents of District 28 for two years prior to the election. *Id.* On August 25, 1987, the Committee certified Harden as the Democratic nominee for the November 3 general election, and unanimously denied Foster's election contest petition. *Id.* Foster then filed a petition for judicial review with the Circuit Court of Hinds County. *Id.*

[60] *Id.* Foster appealed the lower court's adverse determination to the Mississippi Supreme Court. *Id.*

[61] *Id.* Art. IV, § 38 of the Mississippi Constitution provides that "[e]ach house shall elect its own officers, and shall judge of the qualifications, return and election of its own members." MISS. CONST. art. IV, § 38.

[62] *Foster*, 536 So. 2d at 906. The court stated that in the United States and the several states, there is an almost universal doctrine which provides that:

> [e]ach legislative body is the sole judge of the elections, returns and qualifications of its own members, and its action in admitting or expelling a member is not reviewable in the courts. Furthermore, a statute which requires a court to inquire into the commission of corrupt practices in the election of a member of the legislature is not constitutional.

Id. (citing 16 C.J.S., *Constitutional Law* § 201 (1984)).

[63] *Id.* at 907. *See* Dye v. State *ex rel.* Hale, 507 So. 2d 332, 346 (Miss. 1987) (powers of government are separate only insofar as Constitution makes them separate). In a dissenting opinion, Justice Zuccaro argued that § 38 of the Mississippi Constitution establishes a regime of concurrent jurisdiction between the judiciary and the legislature over certain questions of law such as residency requirements under § 42 of the Mississippi Constitution. *Foster*, 536 So. 2d at 908 (Zuccaro, dissenting).

to hear such a case.[64]

In *Breland v. Mallett*,[65] the Mississippi Supreme Court addressed the issue of whether a member of a party executive committee may qualify as a candidate during the term in which he serves as a member of such committee. In *Breland*, a candidate for the August 1987 Democratic party nomination for Supervisor filed an election contest with the Stone County Democratic Party Executive Committee, contending that his opponent had been improperly certified as a candidate because he had actively served as a member of the Executive Committee during the August 1987 elections.[66] After an adverse decision by the Committee, the candidate filed for judicial review in the circuit court of the county.[67] A special tribunal heard the contest and disqualified the opponent, having found that he had actively served as a member of the Executive Committee at all times in question.[68] In its decision, the Mississippi Supreme Court found that under section 25-15-263 of the Mississippi Code, the duties, responsibilities and penalties that apply to the Election Commission equally apply to the Executive Committees of the political parties.[69] The court, therefore, determined that

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[64] *Foster*, 536 So. 2d at 907. Accordingly, the court affirmed the judgment of the circuit court. *Id.*

[65] 527 So. 2d 629 (Miss. 1988).

[66] *Breland*, 527 So. 2d at 630. Orbin S. Mallet and John Herman Breland were the two candidates for the August 25, 1987, primary election for the Democratic Party nomination for the office of Supervisor, District 4, Stone County, Mississippi. *Id.* Breland was a member of the Stone County Democratic Party Executive Committee and had tendered a letter to the Committee on July 16, 1987, requesting leave of absence for the period commencing August 1, 1987, and ending October 31, 1987, in order that he might run for the office of Supervisor. *Id.* The canvass of votes in the August 25 election indicated Breland to be the Democratic Party nominee. *Id.* Mallet then filed an election contest with the Committee, asserting that Breland had been improperly certified as a candidate because he was an acting member of the Committee and served as such during the August 1987 elections, attending meetings, assisting in the conduct of the election and handling ballots and election paraphernalia with his own hands. *Id.*

[67] *Id.* The Executive Committee heard the contest, but certified Breland as the Democratic Party nominee. *Id.* On petition to the circuit court, Mallet contended that he should be declared the nominee for the office, or that he should be granted a new primary election. *Id.*

[68] *Id.* The tribunal determined that the document tendered by Breland in support of a leave of absence had no effect due to Breland's conduct in continuing to serve actively on the committee and, thereby, declared Mallet as the Democratic Party nominee. *Id.*

[69] *Id.* at 631. Section 25-15-263, provides in pertinent part that "[t]he county executive committee at primary elections shall discharge the functions imposed upon the county election commissioners. . . and shall be subject to all the penalties to which county election commissioners are subject." MISS. CODE ANN. § 25-15-263 (Supp. 1987).

section 25-15-263 incorporates the prohibition of Mississippi Code section 23-15-217, which prevents a member of the Election Commission from being a candidate during the term of his office.[70] Accordingly, the court held that the penalty clause of section 23-15-217 prohibits a member of an executive committee of a political party from being a candidate during the term in which he serves as a member of the committee.[71]

IV. Tax Refunds

One important case receiving review by the Mississippi Supreme Court in the area of use tax refunds was *Weeks Dredging & Contracting, Inc. v. Mississippi State Tax Commission*.[72] Weeks, a New Jersey corporation, which had performed certain dredging work for construction of the Tennessee-Tombigbee Waterway in northeast Mississippi sought a refund of a use tax assessment it had paid to the Mississippi State Tax Commission.[73] The assessment covered the consumption of diesel fuel as a result of the dredging operation in Mississippi.[74] Weeks claimed that because it had paid sales taxes to Alabama on this fuel, which had been shipped to Mississippi from its place of storage in Moundville, Alabama, it was, therefore, entitled to a credit under Mississippi Code section 27-67-7 for the sales taxes paid to Alabama.[75] The court, however, interpreted section 27-67-7 as providing

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[70] *Breland*, 527 So. 2d at 631. Section 23-15-217, provides in part:

> A commissioner of election of any county shall not be a candidate for any office at any election for which he may have been elected or with reference to which he has acted as such; and all votes cast for any such person at such election shall be illegal and shall not be counted. . . .

Miss. Code Ann. § 23-15-217 (Supp. 1987). *See* Meeks v. Tallahatchie County, 513 So. 2d 563, 568 (Miss. 1987) (election commissioner who resigned as such prior to qualifying for office was disqualified to run for office pursuant to § 23-15-217).

[71] *Breland*, 527 So. 2d at 631. The court stated that the election process must be kept untainted and beyond suspicion. *Id.* The court explained that both sections 23-15-263 and 23-15-217 were enacted to maintain the integrity of the election process and, accordingly, the court affirmed the decision of the Special Tribunal. *Id.*

[72] 521 So. 2d 884 (Miss. 1988).

[73] *Weeks*, 521 So. 2d at 884. Weeks performed dredging work in Mississippi from October 25, 1980, through September 30, 1982. *Id.* at 885.

[74] *Id.* at 884. Weeks ordered the diesel fuel from Chevron, USA, Inc. Chevron produced the fuel at its refinery in Pascagoula, Mississippi and stored it for distribution in Moundville, Alabama. *Id.* at 885. Delivery of the fuel was by common carrier. *Id.* Weeks would pay Chevron according to the invoice issued to the carrier and would also pay the carrier's shipment charges. *Id.* Additionally, Weeks paid the Alabama state and local taxes on the fuel purchases. *Id.*

[75] *Id.* at 887. Section 27-67-7 provides in pertinent part that a use tax will not be

for a credit only where the sales taxes paid in another state are "properly" imposed.[76] The court explained that if credit were allowed for improperly imposed taxes, a company could pay even the most patently improper tax assessments in another state, gain an exemption in Mississippi, and then gain a refund in the taxing state, thereby providing itself with a vehicle to potentially insulate it from all tax liability for such transactions.[77] The court then reviewed the assessment of the Alabama sales tax and determined that under the Alabama Department of Revenue's regulations, the Alabama sales tax was improperly imposed[78] and, moreover, that such sales tax was an impermissible burden on interstate commerce.[79] The court explained that Weeks should have appealed the obviously contradictory administrative determination of the Alabama Department of Revenue and, accordingly, denied Week's request for a refund, concluding that Weeks was not protected where it had paid an improperly assessed sales tax for out-of-state

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collected "[o]n the use, storage or consumption of any tangible personal property if the sale thereof. . . has already been included in the measure of a sales tax imposed by another state in which the property was used. . . ." MISS. CODE ANN. § 27-67-7 (Supp. 1987).

[76] *Weeks*, 521 So. 2d at 887. The court determined that the phrase "included in the measure of a sales tax imposed by another state" was sufficiently ambiguous to require some statutory construction. *Id.* The court focused on the term "imposed" and determined that such term fairly implies taxation by authority. *Id. See* BLACK'S LAW DICTIONARY 680 (5th ed. 1979) (impose defined as follows: "to levy or exact as by authority; to lay as a burden, tax, duty or charge"). The court, therefore, concluded that a credit can only be given for sales taxes levied by another state which has the authority to impose such a tax, such that the tax would be properly imposed. *Weeks*, 521 So. 2d at 887.

[77] *Weeks*, 521 So. 2d at 887.

[78] *Id.* at 888. The court cited Rule 114-012 of the Alabama Department of Revenue's regulations which forbids Alabama from imposing a sales tax on transactions involving shipments out of state by the use of common carriers, as such transactions are in interstate commerce and cannot be taxed by the Alabama sales tax law. *Id.*

[79] *Id.* at 890. The court stated that for a tax to withstand commerce clause challenge, it must satisfy the test as found in Complete Auto Transit Co. v. Brady, 430 U.S. 274, 279 (1977), which provides that "(1) the tax must be applied to an activity with a substantial nexus with the taxing state; (2) it must be fairly apportioned; (3) it must not discriminate against interstate commerce, and (4) it must be fairly related to the services provided by the state." *Weeks*, 521 So. 2d at 889. The court found that the first prong of the test was not met because the fuel was produced in Mississippi, the sale was initially negotiated outside of Alabama, and under Alabama law the sale should have been considered a non-taxable event. *Id.* The court explained that the mere changing of possession of the fuel in Alabama did not create a substantial nexus with the State of Alabama. The court then concluded that the failure to meet one prong of the test renders the tax invalid. *Id.* at 890 (citing Marx v. Truck Renting and Leasing Association, 520 So. 2d 1333 (Miss. 1988)).

purchases.[80]

V. Eminent Domain

In *Mississippi State Highway Commission v. Herban*,[81] the Mississippi Supreme Court rendered a significant decision clarifying issues with regard to the clerk's commission in eminent domain cases. Three major issues were addressed: (1) whether the clerk of the circuit court is entitled to a commission in eminent domain proceedings, particularly where the condemning authority has utilized the quick take procedure; (2) whether the clerk's commission should be deducted from the monies handled by him before they are paid to the landowner or whether the commission must be paid by the condemning authority over and above the sums paid into court; and (3) whether the commission is automatically set at one-half of one percent (½ of 1%) of the sums handled by the clerk.[82] As with regard to the first issue, the court explained that under section 27-7-13 of the Mississippi Code, a clerk is entitled to a commission on "all money coming into his hands."[83] The court found no exceptions to the word "all."[84] In addition, the court reasoned that under Mississippi Code section 9-7-121, the clerk would be liable on his bond were any loss to occur in the handling of eminent domain funds.[85] Based on these considerations, the court held that the

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[80] *Weeks*, 521 So. 2d at 889-90. The court found no reversible error in the record and, accordingly, affirmed the chancery court's judgment denying Weeks a refund. *Id.* at 890.

[81] 522 So. 2d 210 (Miss. 1988).

[82] *Herban*, 522 So. 2d at 211, 213. In *Herban*, the Mississippi State Highway Commission (MSHC), as condemning authority, initiated eminent domain proceedings with regard to a parcel of property located in Lowndes County. *Id.* at 211. Utilizing the quick take procedure as authorized by Miss. Code Ann. § 11-27-85 (Supp. 1987), MSHC deposited a substantial sum of money with the circuit clerk and took immediate possession of the property. *Id.* The Circuit Court of Lowndes County dismissed the case on the grounds that the case had been fully settled and further ordered that MSHC pay the clerk's commission of one-half of one percent of the sum deposited. *Id.* MSHC appealed, claiming that the clerk was not entitled to a commission in eminent domain proceedings. *Id.*

[83] *Id.* at 213. Section 25-7-13(5) provides that "[t]he clerk of the circuit court may retain as his commission on all money coming into his hands, by law or order of the court, a sum to be fixed by the court not exceeding one-half of one percent (½ of 1%) on all such sums." Miss. Code Ann. § 25-7-13(5) (Supp. 1987).

[84] *Herban*, 522 So. 2d at 213.

[85] *Id.* at 212. The court explained that in eminent domain cases, the circuit clerk receives, handles and disburses substantial sums of money and is also accountable for these funds. *Id.* In addition, the court stated that the clerk's bond under Miss. Code Ann. § 9-7-121 (Supp. 1987), covers all monies coming into the hands of the clerk, in-

clerk was entitled to the statutory commission on sums deposited in eminent domain proceedings.[86]

As to the second issue, the court determined that the clerk's commission must be paid by the condemning authority, over and above the sums paid into court under sections 11-27-27 and 11-27-85.[87] The court explained that a landowner has a constitutional right to "due compensation" under article 3, section 17 of the Mississippi Constitution and, therefore, the landowner may not constitutionally be assessed with costs in an eminent domain proceeding in such a manner that diminishes his compensation received.[88] Moreover, the court held that the statutory mandate in section 11-27-27 of the Mississippi Code requires that the condemning authority "shall pay the costs of the court."[89]

Finally, as to the amount of the commission to be awarded, the court held that under the plain language of section 25-7-13(5), the amount of the commission is to be determined by the court and is not to exceed one-half of one percent (½ of 1%).[90] The court explained

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cluding money deposited when the quick take procedure is utilized. *Id.* Section 9-7-121 provides in part:

> The clerk of the circuit court, before he enters upon the duties of the office, shall take the oath of office, and give bond. . . And he may be required to give additional bond from time to time, for the faithful application of all moneys coming into his hands by law or order of the court; but such additional bonds shall be cumulative security, and the original bond shall likewise cover all monies coming into the hands of the clerk by law or order of the court.

MISS. CODE ANN. § 9-7-121 (Supp. 1987).

[86] *Herban*, 522 So. 2d at 213.

[87] *Id.* The court recognized that MISS. CODE ANN. § 25-7-13(5) uses the word "retain" and that the word connotes a process whereby the clerk deducts his commission before paying the monies to the landowner. *Id.* However, the court stated that such a wooden reading of the word "retain" would defeat the clerk's commission, and there is no indication in the law that this ought to be done. *Id.*

[88] *Id. See* Pearl River Valley Water Supply Dist. v. Brown, 184 So. 2d 407, 408-09 (Miss. 1966) (landowner may not be subjected to diminution of full measure of due compensation by liability as to any part of cost incurred); State Highway Commission v. Mason, 6 So. 2d 468, 469 (Miss. 1942) (same).

[88] *Herban*, 522 So. 2d at 213. Section § 11-27-27 provides in part:

> Upon the return of the verdict and entry of the judgment, the applicant shall pay to the defendants, or to the clerk if the defendants absent themselves, the difference between the judgment and the deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried.

MISS. CODE ANN. § 11-27-27 (1972).

[90] *Herban*, 552 So. 2d at 213. Section 25-7-13(5) expressly provides the clerk's commission shall be "a sum to be fixed by the court not exceeding one half of one percent on all such sums." MISS. CODE ANN. § 25-7-13(5) (Supp. 1987).

that the amount of commission is not automatically set at one-half of one percent, but is within the courts considerable discretion, and may range from a nominal commission up to an amount equalling, but not exceeding, one-half of one percent.[91]

Rob Rhea

[91] *Herban*, 522 So. 2d at 213. The court affirmed the circuit court's decision to award a commission, but vacated the amount of the commission which was set at one-half of one percent. *Id.* at 213-14. The court remanded to the circuit court with instructions that a commission be fixed in an amount consistent with the court's interpretation of MISS. CODE ANN. § 25-7-13(5). *Id.* at 214.

CIVIL PROCEDURE

The 1988 Mississippi Supreme Court addressed a diverse range of civil procedure issues, including additur,[1] affirmative defenses,[2] appeals,[3] attachment,[4] choice of law,[5] collateral estoppel and res judicata,[6] costs,[7] damages,[8] declaratory actions,[9] discovery,[10] dismissals,[11]

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[1] State Highway Comm'n of Miss. v. Warren, 530 So. 2d 704, 707 (Miss. 1988) (unless jury's verdict is either so shocking to conscience that it indicates bias, passion and prejudice, or contrary to overwhelming weight of evidence, granting of new trial upon rejection of additur is abuse of discretion).

[2] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 138 (Miss. 1988) (affirmative defenses are waived unless plead or tried by consent); Gulf City Fisheries, Inc. v. Bobby Kitchens, Inc., 518 So. 2d 661, 663-64 (Miss. 1988) (affirmative defenses require response in denial or avoidance and absent such response issue or issues may be disposed of prior to trial). The court in *Gulf City Fisheries* did not apply the Mississippi Rules of Civil Procedure because both parties agreed that they were inapplicable since the case predated their adoption. *Id.* at 663. Instead, the court applied MISS. CODE ANN. § 11-7-59 (1972). *Gulf City Fisheries*, 518 So. 2d at 663. This code section was supplanted by the adoption of the Mississippi Rules of Civil Procedure in 1982. *See* MISS.R.CIV.P. 81(d).

[3] *In re* Newsom, 536 So. 2d 1, 2 (Miss. 1988) (estimated guardian ad litem's fee is not required to be paid prior to securing appeal); Cunningham v. Mitchell, 535 So. 2d 589, 592 (Miss. 1988) (notice of appeals by infants must be filed within two (2) years of entry of judgment or order); H & W Transfer & Cartage Serv. v. Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule 60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty; additionally, Mississippi Supreme Court Rules are amended to require that motions to correct mandate must be filed within fourteen (14) days after Court has issued mandate or any addition to it).

[4] Anderson v. Sonat, 523 So. 2d 1024, 1027-28 (Miss. 1988) (affidavit in support of petition for attachment must include reasons why complaintant's ability to recover his claim may be lost if attachment is not issued and statement of amount sought; additionally, strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of common law).

[5] Anderson v. Sonat, 523 So. 2d 1024, 1027 (Miss. 1988) (where suit involves document which affects land in another state, law of that state may control under "center of gravity" test).

[6] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 139 (Miss. 1988) (res judicata must be affirmatively plead and may not be raised by court upon its own motion); Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188, 190 (Miss. 1988) (dismissal in another state for expiration of statute of limitations is not adjudication on merits and not res judicata); Weaver v. City of Pascagoula, 527 So. 2d 651, 652-54 (Miss. 1988) (doctrine of collateral estoppel is inapplicable against party who was neither party nor in privity with party in prior action).

[7] *In re* Newsom, 536 So. 2d 1, 2 (Miss. 1988) (estimated guardian ad litem's fee is not required to be paid prior to securing appeal); H & W Transfer & Cartage Serv. v.

due process,[12] election contests,[13] experts,[14] forum non conveniens,[15] full faith and credit,[16] garnishment,[17] grand jury witness testimony,[18]

Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule 60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty).

[8] Whittley v. City of Meridian, 530 So. 2d 1341, 1346 (Miss. 1988) (jury may no longer be informed of amount of settlement by co-defendant or joint-tortfeasor; trial judge shall reduce any amount awarded by jury by present value of settlement).

[9] Johnson v. Hinds County, 524 So. 2d 947, 953-54 (Miss. 1988) (county is an "interested party" and has standing to seek declaratory judgment that lot owners are required to permit land developer to make improvements required by county subdivision ordinances).

[10] State Highway Comm'n v. Culpepper, 536 So. 2d 18, 19-20 (Miss. 1988) (discovery provisions of Mississippi Rules of Civil Procedure are applicable to eminent domain proceedings, absent procedural statute to contrary; jury verdict cannot stand where discovery is unduly restricted); Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 214-15 (Miss. 1988) (discovery provisions of Mississippi Rules of Civil Procedure are applicable to eminent domain proceedings, absent procedural statute to contrary; jury verdict will not stand where discovery is unduly restricted).

[11] Bolls v. Harris, 528 So. 2d 1128, 1129 (Miss. 1988) (motion for voluntary dismissal without prejudice may not be granted without giving defendant or defendants five (5) days notice and hearing); Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So. 2d 857, 860-61 (Miss. 1988) (to withstand motion to dismiss for failure to state cause of action complaint need only contain allegations from which elements of cause of action may be inferred).

[12] Evanish v. Berry, 536 So. 2d 7, 8-9 (Miss. 1988) (disciplinary actions of incorporated private social clubs are not subject to due process standards).

[13] Foster v. Harden, 536 So. 2d 905, 907 (Miss. 1988) (circuit courts do not have subject matter jurisdiction over questions concerning status of candidate's residency);Rizzo v. Bizzell, 530 So. 2d 121, 126 (Miss. 1988) (although Code section allows Supreme Court to review election contest hearing and make independant findings of fact, Court will defer to special judge's findings even where majority of county commissioners dissented from such findings).

[14] Hudspeth v. State Highway Comm'n, 534 So. 2d 210, 213 (Miss. 1988) (Mississippi Rules of Evidence are amended to provide that court appointed appraisers are incompetent to testify in eminent domain trials).

[15] Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557, 562 (Miss. 1988) (doctrine of forum non conveniens will not be applied to causes of action which may not be maintained in any other forum because of statutes of limitations, unless defendant agrees to waive statute of limitations defense). For a detailed analysis of Shewbrooks v. A.C. and S., Inc., see 1987 Mississippi Supreme Court Reveiw - Civil Procedure, 57 MISS.L.J. 443, 460-66 (1987). However, the 1989 Mississippi legislature amended Mississippi Code section 15-1-65 to provie that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989.

[16] Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188, 190 (Miss. 1988) (dismissal in another state for expiration of statute of limitations is not adjudica-

injunctions,[19] interlocutory appeals,[20] jurisdiction,[21] mandates,[22] motions in limine,[23] post-trial motions,[24] presumptions,[25] punitive damages,[26] relief from judgments,[27] remittitur,[28] the scope of judicial in-

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tion on merits and thus is not entitled to full faith and credit).

[17] Anderson v. Sonat, 523 So. 2d 1024, 1028 (Miss. 1988) (strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of common law).

[18] *In re* Knapp, 536 So. 2d 1330, 1331-32 (Miss. 1988)(statute which prohibits grand jury witnesses from disclosing contesnts of their testimony does not preclude witness from answering dispositive questions which relate to the same subject matter).

[19] Ray v. Snow, 525 So. 2d 394, 395-96 (Miss. 1988) (party claiming damages under injunction bond must file written suggestion of damages with motion to dissolve injunction or pursue separate cause of action).

[20] American Elec. v. Singarayar, 530 So. 2d 1319, 1323 (Miss. 1988) (interlocutory appeals should not be granted where legal standards are not subject to dispute, unless application of legal standards to facts in specific case is so difficult as to make case substantially equivalent to one in which legal standards are subject to dispute).

[21] Blackledge v. Scott, 530 So. 2d 1363, 1365-66 (Miss. 1988) (state constitution precludes reversal soley on grounds of lack of subject matter jurisdiction); Wilkinson v. Mercantile Natl. Bank at Dallas, 529 So. 2d 616, 618-20 (Miss. 1988) (any national banking association which invests funds in Mississippi may sue or be sued in Mississippi in actions relating to such investments); Anderson v. Sonat, 523 So. 2d 1024, 1027 (Miss. 1988) (executing legal document and having it notarized in Mississippi satisfies both statutory and constitutional requirements for personal jurisdiction in suit arising out of document; additionally, where suit involves document which affects land in another state, subject matter jurisdiction is proper where action is for cancellation or reformation of document and not suit to try title).

[22] H & W Transfer and Cartage Serv., Inc. v. Griffin, 534 So..2d 216, 217 (Miss. 1988) (Mississippi Supreme Court Rules are amended to require that motions to correct mandate must be filed within fourteen (14) days after court has issued mandate or any addition to it).

[23] Whittley v. City of Meridian, 530 So. 2d 1341, 1344 (Miss. 1988) (motions in limine should only be granted where evidence is inadmissible under rules of evidence and mere reference to evidence will tend to prejudice jury against movant).

[24] Telford v. Aloway, 530 So. 2d 179, 181 (Miss. 1988) (trial judges have no discretion to enlarge time period for post-trial motions; all post-trial motions must be made within ten-day time period set forth in Miss.R.Civ.P. 59(b)).

[25] Luter v. Oakhurst Assoc., Ltd., 529 So. 2d 889, 894 (Miss. 1988) (offical acts of municipal corporation are presumed to be valid; to challenge regularity of such acts it must be affirmatively demonstrated that formalities were not met).

[26] Whittington v. Whittington, 535 So. 2d 573, 584 (Miss. 1988) (in order for punitive damages to be assessed against defendant, evidence as to defendant's "net worth" must be presented; evidence of assets alone will not suffice).

[27] Accredited Sur. and Casualty Co., Inc. v. Bolles, 535 So. 2d 56, 59 (Miss. 1988) (Rule 60(b) motions should only be granted upon showing of "exceptional circumstances;" gross negligence, ignorance of rules, ignorance of law, or carelessness on part of attorney will not provide sufficient grounds for relief); H & W Transfer & Cartage Serv. v. Griffin, 534 So. 2d 216, 217 (Miss. 1988) (affirmance of trial court's denial of Rule

quiry into disciplinary actions of private clubs,[29] settlements,[30] service of process,[31] service by publication,[32] standing,[33] statutes of limitation,[34] summary judgment,[35] and venue.[36] Cases receiving textual dis-

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60(b) motion to vacate judgment is equivilent to affirmance of judgment and appellee is entitiled to recovery of 15% statutory damage penalty).

[28] Dorrill v. State Highway Comm'n of Miss., 525 So. 2d 1333, 1335 (Miss. 1988) (unless jury's verdict is either so shocking to conscience that it indicates bias, passion and prejudice, or contrary to overwhelming weight of evidence, granting of new trial upon rejection of remittitur is abuse of discretion).

[29] Evanish v. Berry, 536 So. 2d 7, 8-9 (Miss. 1988) (disciplinary actions of incorporated private social clubs are not subject to due process standards; judicial inquiry into such actions is limited to determining whether club acted in good faith under by-laws adopted by it).

[30] Whittley v. City of Meridian, 530 So. 2d 1341, 1346 (Miss. 1988) (jury may no longer be informed of amount of settlement by co-defendant or joint-tortfeasor; trial judge shall reduce any amount awarded by jury by present value of settlement).

[31] Public Employees' Retirement Sys. of Miss. v. Dillon, 538 So. 2d 327, 328-29 (Miss. 1988)(Public Employee's Retirement System is "domestic corporation"; service of process upon agent for System was sufficient.

[32] Caldwell v. Caldwell, 533 So. 2d 413, 417 (Miss. 1988) (diligent search and inquiry to determine address of defendant must be made before summons by publication may be used).

[33] Luter v. Oakhurst Assoc., Ltd., 529 So. 2d 889, 892 (Miss. 1988) (property owners had standing to appeal decision in zoning dispute adverse to city where city choose not to appeal decision); Johnson v. Hinds County, 524 So. 2d 947, 953-54 (Miss. 1988) (county is "interested party" and has standing to seek declaratory judgment that lot owners are required to permit land developer to make improvements required by county subdivision ordinances).

[34] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136, 139-40 (Miss. 1988) (where limited partners' brought suit against general managing partner for breach of fiduciary duties, action was purely equitable because breach gave rise to imposition of implied trust and therefore action was controlled by ten-year statute of limitations rather than general six-year statute of limitations); Lee v. Swain Bldg. Materials Co. of New Orleans, 529 So. 2d 188, 190 (Miss. 1988) (Mississippi statute of limitations applied where Louisiana residents were injured in Louisiana and brought suit against corporation organized under Mississippi law with its principle place of business in Louisiana; additionally, dismissal in another state for expiration of statute of limitations is not adjudication on merits and thus is not entitled to full faith and credit); Shewbrooks v. A.C. and S., Inc., 529 So. 2d 557, 566-67 (Miss. 1988) (Mississippi's statutes of limitations apply to all suits filed in Mississippi, even in cases where cause of action accrued in another state). For a detailed analysis of Shewbrooks v. A.C. and S., Inc., see *1987 Mississippi Supreme Court Review - Civil Procedure*, 57 MISS. L. J. 443, 460-66 (1987). However, the 1989 Mississippi Legislature amended Mississippi Code Annotated section 15-1-65 to provide that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989; Reich v. Jesco, Inc., 526 So. 2d 550, 552 (Miss. 1988) (to establish fraudulent concealment such as will toll statute of limitations, there must be some act of affirmative nature to prevent discov-

cussion confront the issues of when a motion in limine should be granted,[37] whether court-appointed appraisers in eminent domain cases are competent to be witnesses,[38] the time in which a motion to amend a mandate must be filed,[39] the statutory and constitutional limits of personal jurisdiction,[40] whether trial judges have the discretion to enlarge the time period for post-trial motions,[41] whether a judge may raise the issue of res judicata upon his or her own motion,[42] whether a dismissal in another state for expiration of the statute of limitations is entitled to full faith and credit[43] and whether the jury should be informed of the amount of a joint tortfeasor's or co-defendant's settlement with the plaintiff.[44]

I. Promgulation of New Procedural Rules

Utilizing its inherent power to establish rules governing trial procedure,[45] the 1988 Mississippi Supreme Court amended three procedural rules in *H & W Transfer & Cartage Service, Inc. v. Griffin*[46] and *Hudspeth v. State Highway Commission.*[47]

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ery of claim).

[35] Reich v. Jesco, Inc., 526 So. 2d 550, 552 (Miss. 1988) (party opposing motion for summary judgment must present probative evidence demostrating existence of triable issue of fact; mere allegations will not suffice); Magnolia Constr. Co. Inc., v. Miss. Gulf S. Eng's, Inc., 518 So. 2d 1194, 1199-98 (Miss. 1988) (genuine issues of material fact exist and preclude summary judgment where contract is ambiguous).

[36] Blackledge v. Scott, 530 So. 2d 1363, 1365-66 (Miss. 1988) (if venue is proper as to one defendant, it is proper as to all defendants even though defendant upon whom venue is based is later dismissed from suit, unless original joinder of defendant upon whom venue is based amounted to fraud).

[37] Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988).

[38] Hudspeth v. State Highway Comm'n, 534 So. 2d 210 (Miss. 1988).

[38] H & W Transfer and Cartage Serv., Inc. v. Griffin, 534 So.2d 216 (Miss. 1988).

[40] Anderson v. Sonat, 523 So. 2d 1024 (Miss. 1988); Wilkinson v. Mercantile Nat'l Bank at Dallas, 529 So. 2d 616 (Miss. 1988).

[41] Telford v. Aloway, 530 So. 2d 179 (Miss. 1988).

[42] Wholey v. Cal-Maine Foods, Inc., 530 So. 2d 136 (Miss. 1988).

[43] Lee v. Swain Bldg. Materials Co. of New Orleans, Inc., 529 So. 2d 188 (Miss. 1988).

[44] Whittley v. City of Meridian, 530 So. 2d 1341 (Miss. 1988).

[45] Newell v. State, 308 So. 2d 71, 76-77 (Miss. 1975).

[46] 534 So. 2d 216 (Miss. 1988).

[47] 534 So. 2d 210 (Miss. 1988).

A. *New Mississippi Supreme Court Rule 41(d): Motion to Amend or Correct Mandate*

In *H & W Transfer & Cartage Service, Inc. v. Griffin*,[48] the Supreme Court amended Mississippi Supreme Court Rule 41[49] to provide that motions to amend or correct a mandate must be filed within fourteen (14) days after the mandate has been issued or amended by the court.[50] The court orginally entered its mandate in *Griffin* on July 24, 1987.[51] However, 343 days later, on July 1, 1988, Griffin moved to amend the mandate to include the fifteen percent (15%) statutory penalty imposed by section 11-3-23 of the Mississippi Code.[52]

Concluding that Griffin was entitled to recover the statutory penalty,[53] the court addressed H & W Transfer's argument that the motion should be denied as untimely.[54] Despite the lengthy delay, the court held that since H & W Transfer had not attempted to show prejudice,[55] they had no authority to deny the motion.[56] However, noting that the absence of a time limit upon such motions was in fact a "glitch," the court observed that there should be a "reasonable time limit."[57] Therefore, the court amended Mississippi Supreme Court Rule 41 by adding section (d) to provide that motions to amend or correct a mandate must be filed within fourteen (14) days after the mandate has been issued or amended by the court.[58]

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[48] *Griffin*, 534 So. 2d at 216.

[49] *Id.* at 218. Rule 41 concerns the issuance of mandates. MISS. SUP. CT. R. 41 (1988).

[50] *Griffin*, 534 So. 2d at 218.

[51] *Id.* at 217.

[52] *Id.* Section 11-3-23, in pertinent part, provides:

> In case the judgment or decree of the court below be affirmed,. . .the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree be for a sum of money, the damages shall be upon such sum.

MISS. CODE ANN. § 11-3-23 (Supp. 1988).

[53] *Griffin*, 534 So. 2d at 217. In *Griffin*, the Mississippi Supreme Court affirmed the trial court's denial of the defendant's motion under Rule 60(b) to vacate or set aside the judgement. *Griffin*, 534 So. 2d at 217. However, the court reasoned that such an affirmance was the equivalent of the affirmance of a judgment. *Id.* Therefore, the court held that Griffin was entitled to recover the 15% statutory damage penalty. *Id.*

[54] *Id.*

[55] *Id.* The court commented that they were only "favored" with the conclusory allegation that the delay was "unreasonable." *Id.*

[56] *Id.* Although acknowledging that the delay was "unusual," the court explained that the current rules placed no time limit upon the filing of such motions. *Id.*

[57] *Id.* at 218.

[58] *Id.* The court chose a fourteen day period by analogizing motions to amend a mandate to motions to retax costs, which must be made within fourteen days under

B. *New Provisions in the Mississippi Rules of Evidence*

The Mississippi Supreme Court added two new provisions to the Mississippi Rules of Evidence in *Hudspeth v. State Highway Commission.*[59]

During the course of an eminent domain trial in Leake County, the landowner (Hudspeth) attempted to call the court appointed appraiser[60] as a witness.[61] However, the trial judge refused to allow Hudspeth's request because of section 11-27-89 of the Mississippi Code, which renders court appointed appraisers incompetent to testify in eminent domain proceedings.[62]

On appeal, Hudspeth argued that Rule 601[63] of the recently adopted Mississippi Rules of Evidence,[64] which contains no provision rendering court appointed appraisers incompetent, controlled the competency of witnesses and not section 11-27-89 of the Mississippi Code.[65]

Although the case was reversed and remanded on other grounds,[66] the court found no merit in Huspeth's assignment of error regarding

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MISS. SUP. CT. RULE 36(d). *Griffin*, 534 So. 2d at 218. The court stated that a new subsection (d) shall read: "(d) *Motion To Amend or Correct Mandate; Time For Filing.* Any motion to amend or correct the mandate may be filed within fourteen (14) days after the court has issued the mandate or any addition to the mandate."
Griffin, 534 So. 2d at 218.

[59] 534 So. 2d 210 (Miss. 1988).

[60] *Hudspeth*, 534 So. 2d at 212. The statute which creates the court appointed appraiser is known as the "quick take" statute. *Id.* at 213 (citing MISS. CODE ANN. § 11-27-89 (Supp. 1988)). It was designed to enable the Highway Commission to aquire land needed for highway programs as quickly as possible, while protecting the interests of the landowners. *Id.* The court appointed appraiser's valuation of the compensation and damage award is used to determine the amount which the Commission must deposit with the court and "quickly take" the land or right of way. *Id.*

[61] *Id.* at 212.

[62] *Id.*

[63] *Id.* Rule 601 states: "Every person is competent to be a witness except as restricted by MISS. CODE ANN. § 13-1-5 (competency of spouses) and § 13-1-11 (persons convicted of perjury or subordination of perjury), or by these rules." MISS. R. EVID. 601 (1988).

[64] *Hudspeth*, 534 So. 2d at 212. The Mississippi Rules of Evidence were adopted January 1, 1986. *Id.*

[65] *Id.*

[66] *Id.* at 214-15. The trial judge refused to order the Commission to allow Hudspeth to discover the subject matter of which their appraisers were to testify. *Id.* Concluding that the Mississippi Rules of Civil Procedure were applicable to eminent domain cases, the court observed that Rule 26(b)(4)(A)(i) specifically makes the subject matter of expert testimony discoverable. *Hudspeth*, 534 So. 2d at 214-15. Therefore, the court held that the trial court unduly restricted discovery and remanded for a new trial. *Id.*

the trial judge's refusal to allow the court appointed appraiser to testify.[67] The court agreed that since section 11-27-89 was inconsistent with Rule 601 of the Mississippi Rules of Evidence, Rule 601 controlled.[68] However, recognizing the importance of disallowing court appointed appraisers to testify in eminent domain proceedings,[69] the court amended Rule 601 of the Mississippi Rules of Evidence to incorporate section 11-27-89.[70] Anticipating a similar conflict with Rule 706 of the Mississippi Rules of Evidence 706,[71] the court also amended it to provide that section 11-27-89's procedures for appointing experts in eminent domain cases shall remain in full force and effect to the extent to which they do not conflict with Rule 706.[72] As to the effective date of the amendments, the court held the the "least discommoding effect" would be achieved by a retroactive application of both rules to January 1, 1986.[73]

II. Settlements and the Determination of Damages

Whittley v. City of Meridian[74] presented the Mississippi Supreme Court with the opportunity to modify the prodedure used to determine damages due a plaintiff where one or more co-defendants have settled with the plaintiff.[75]

The action arose when a side-slanted refuse bin fell on four-year old Maranda Ann Whittley.[76] Two defendants settled with Maranda

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[67] *Hudspeth*, 534 So. 2d at 213.

[68] *Id.*

[69] *Id.* The court noted that the court appointed appraiser is an "integral" part of this process because his or her valuation of the compensation and damage award is used to determine the amount which the Commission must deposit with the court before it may "quickly take" the land or right of way. *Id.* While the court commented that the part of the statute which makes these appraisers incompetent as witnesses intrudes upon the court's rule making power, the court stated that "[w]here the invasion is minor and where otherwise the legislative enactment is upon a matter of public policy within legislative authority, it may be appropriate that we give deference to the legislature's judgment." *Id.*

[70] *Id.* The amended rule reads: "Every person is competent to be a witness except as restricted by Miss. Code Ann. § 13-1-5 (competency of spouses) and § 13-1-11 (persons convicted of perjury or subordination of perjury), § 11-27-89 (court appointed appraisers in eminent domain cases), or by these rules." *Hudspeth*, 534 So. 2d at 213.

[71] *Hudspeth*, 534 So. 2d at 213. Rule 706 gives trial courts general authority to appoint expert witnesses. Miss. R. Evid. 706 (1988).

[72] *Hudspeth*, 534 So. 2d at 213.

[73] *Id.*

[74] 530 So. 2d 1341 (Miss. 1988).

[75] *Whittley*, 530 So. 2d at 1346.

[76] *Id.* at 1342. Maranda's mother filed suit on her behalf against the City of Merid-

prior to trial.[77] At the close of all the evidence, the jury returned a verdict for the City of Meridian.[78] Plaintiff appealed.[79]

On appeal, appellant argued, *inter alia*, that the trial judge erred when he instructed the jury that they could not give the appellants a verdict unless they found that their total damages were greater than the amount guaranteed to be paid by the other defendants who had settled with Maranda.[80]

The Mississippi Supreme Court reversed and remanded for a new trial, holding, *inter alia*, that the jury should not have been informed of the amount of the settlements.[81] Reasoning that informing jurors of the amount of a settlement would unnecessarily influence their decision, the court concluded that the jury may only be informed of the existence of a settlement.[82]

III. Motions in Limine

In addition to modifiying the prodedure used to determine damages due a plaintiff where one or more co-defendants have settled with the plaintiff,[83] the Mississippi Supreme Court also adopted a test to be used in reviewing motions in limine in *Whittley v. City of Meridian*.[84]

As stated previously, the action arose when a side-slanted refuse bin fell on four-year old Maranda Ann Whittley.[85] Before the trial, the plaintiff learned that the City's engineer had received materials from the Consumer Products Safety Commission concerning potential dangers associated with side-slanted refuse bins.[86] However, when the City's engineer was called as an adverse witness during the plaintiff's

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ian (the City), Taylor Properties, Ltd. (the owner of the apartment complex where the refuse bin was located), Bill Gordon Enterprises (the manufacturer and seller of the refuse bin), Payson Casters (the maker of the wheels on the refuse bin), and the Leach Company (the manufacturer of the garbage trucks used by the City). *Id.*

[77] *Id.* Taylor Properties, Ltd. reached a structured settlement with Maranda for approximately $2.5 million dollars and Payson Casters settled for $25,000. *Id.*

[78] *Id.* The manufacturer of the bin, Bill Gordon, was granted a directed verdict. *Id.*

[79] *Id.*

[80] *Id.* at 1345-46. A procedure similar to the one the trial court used was approved by the court in Garcia v. Coast Elec. Power Assn., 493 So. 2d 380, 385 (Miss. 1986). *Whittley*, 530 So. 2d at 1346.

[81] *Whittley*, 530 So. 2d at 1346.

[82] *Id.* The court held that the trial judge shall reduce any amount awarded by the jury by the present value of the settlement. *Id.*

[83] *Id. See supra* notes 74-82 and accompanying text.

[84] *Whittley*, 530 So. 2d at 1344-45.

[85] *Id.* at 1342. *See supra* note 77.

[86] *Whittley*, 530 So. 2d at 1343.

case-in-chief, the plaintiff's attorney was not allowed to question him about those materials because the trial court had granted the City's motion in limine excluding any reference to the materials.[87] Nonetheless, when one of the defendants' attorneys cross-examined the adverse witness, he testified that ". . . he had never received any information that the garbage bins were unstable or dangerous."[88] The jury returned a verdict for the City and the plaintiff appealed.[89]

The Mississippi Supreme Court reversed and remanded for a new trial, holding, *inter alia*, that "[t]here was no basis for the court's exclusion of the letter."[90] Explaining that the primary purpose of a motion in limine was to exclude highly prejudicial evidence and not to exclude irrelevant evidence,[91] the court adopted a two prong test for determining when a motion in limine should be granted: 1) the evidence must be inadmissible under the rules of evidence; *and* 2) the mere reference to the evidence at trial would tend to prejudice the jury.[92] Based upon this test, the court concluded that the trial court erred in granting the motion in limine.[93]

IV. Time Period for Post-Trial Motions

In *Telford v. Aloway*[94] the Mississippi Supreme Court announced that trial judges have no authority to enlarge the ten-day time limit for post-trial motions found in Rule 59(b) of the Mississippi Rules of Civil Procedure.[95]

On May 6, 1986 a judgment entered against Shelby Aloway provided that the parties would have thirty days within which to file any post-trial motions.[96] However, counsel for the defendant warned plain-

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[87] *Id.* The engineer was questioned about the material out of the presence of the jury in order that a record could be made. *Id.*

[88] *Id.* The trial court also denied plaintiff's counsel's requests to impeach the witness with the materials from the Consumer Products Safety Commission. *Id.*

[89] *Id.*

[90] *Id.* The court also found that the trial court's refusal to allow the City's engineer to be impeached with the materials violated the plaintiff's right to due process. *Id.* at 1344.

[91] *Id.* at 1343-44.

[92] *Id.* at 1344. The test adopted by the court was announced by the Kansas Supreme Court in State v. Quick, 226 Kan. 308, 311, 597 P.2d 1108 (1979). *Whittley*, 530 So. 2d at 1344.

[93] *Whittley*, 530 So. 2d at 1343-45.

[94] 530 So. 2d 179 (Miss. 1988).

[95] *Telford*, 530 So. 2d at 181. Rule 59(b) provides that a motion for a new trial must be served within 10 days after the judgment is entered. MISS. R. CIV. P. 59(b).

[96] *Telford*, 530 So. 2d at 180. Mr. and Mrs. Telford filed suit against Shelby Aloway

tiffs' counsel that he would oppose any motions made after the ten-day time limit imposed by Rule 59(b).[97] Ignoring defense counsel's admonition, plaintiffs filed a motion for a new trial or additur on May 28, 1986, twenty-two days after entry of the judgment.[98] Despite Aloway's objection, the trial court refused to strike the motion as untimely and denied the motion on the merits on August 5, 1986.[99] Thereafter, the Telfords filed a timely notice of appeal on August 15, 1986.[100]

On appeal, Aloway argued that the trial court erred in refusing to strike the Telfords' motion as untimely and therefore, the Telfords' notice of appeal was untimely because the thirty-day period within which to file a notice of appeal began to run on the date judgment was entered, May 6, 1986 and had expired long before the Telfords filed their notice of appeal on August 15, 1986.[101]

The Mississippi Supreme Court dismissed the appeal, holding that the trial judge had no discretion to enlarge the ten-day time limit imposed by Rule 59(b).[102] Interpreting the ten-day time limit to be jurisdictional and mandatory, the court declared that the trial court had no jurisdiction to consider the Telfords' untimely motion for a new trial.[103] Therefore, since the thirty day time period within which to file a notice of appeal began to run on May 6, 1986, the court held that the Telfords' notice of appeal was untimely.[104]

V. Res Judicata

The Mississippi Supreme Court addressed two questions regarding the application of the doctrine of res judicata in *Lee v. Swain Building Materials Co.*[105] and *Wholey v. Cal-Maine Food, Inc.*[106]

A. Lee v. Swain Building Materials Co.[107]

Steven E. Lee and Anna T. Lee, residents of St. Bernard Parsh in Louisiana, were injured in an automobile accident involving an em-

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for injuries and damages arising out of an automobile accident. *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 180-81.

[103] *Id.*

[104] *Id.*

[105] 529 So. 2d 188 (Miss. 1988).

[106] 530 So. 2d 136 (Miss. 1988).

[107] 529 So. 2d 188 (Miss. 1988).

ployee of Swain Building Materials Company of New Orleans (Swain).[108] The Lees orginally filed suit against Swain in the Civil District Court of Orleans Parish.[109] However, the Orleans Parish court found that the action was barred by the Louisiana one-year statute of limitations and dismissed the suit.[110]

On the same day the Louisiana court dismissed the Lees' suit, the Lees filed a complaint against Swain in the Circuit Court of Washington County, Mississippi.[111] Swain moved the Mississippi court for summary judgment, arguing that the action was precluded by the previous dismissal in Louisiana.[112] The trial court sustained Swain's motion and dismissed the action with prejudice.[113]

The Mississippi Supreme Court reversed and remanded for a trial on the merits, holding that the Louisiana judgment was not entitled to full faith and credit.[114] Initially, the court noted that Mississippi statutes of limitations apply to all actions filed in Mississippi.[115] Concluding that a dismissal for expiration of a statute of limitaions is not an adjudication on the merits,[116] the court held that such dismissals in sister states are not entitled to full faith and credit.[117]

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[108] *Id.* at 189. Swain is a Mississippi corporation with its principal place of business in Slidell, Louisiana. *Id.*

[109] *Id.*

[110] *Id.* at 189-90.

[111] *Id.* at 190.

[112] *Id.* Swain also argued that the Mississippi court lacked both personal and subject matter jurisdiction. *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* However, the 1989 Mississippi Legislature amended Mississippi Code Annotated section 15-1-65 to provide that causes of action which arise outside Mississippi may not be maintained in Mississippi if they are barred by a statute of limitation in the place where the cause of action arose, unless the plaintiff is a Mississippi resident. H.B. 1171, Reg. Sess., Miss. Leg. 1989.

[116] *Lee*, 529 So. 2d at 190. While the court acknowledged that Miss. R. Civ. P. 41(b) provides that a dismissal for expiration of a statute of limitations "operates as" an adjudication on the merits, the court explained that "[s]uch a dismissal is not in fact an adjudication upon the merits." *Lee*, 529 So. 2d at 190.

[117] *Lee*, 529 So. 2d at 190. The court stated that an adjudication on the merits is a condition precedent to the applicability of the full faith and credit clause of the United States Constitution. *Id.* The court explained that while dismissals not made upon the merits may bar another suit in the jurisdiction where the judgment was rendered, such dismissals are not res judicata in another state and are not entitled to full faith and credit. *Id.*

B. Wholey v. Cal-Maine Foods Inc.[118]

On March 3, 1983, Mark D. Wholey, M.D. and John A. Rogers filed separate suits against Cal-Maine Foods, Inc. and Cal-Maine Eggs, Inc. (Cal-Maine) in the Chancery Court of Hinds County, alleging that Cal-Maine had breached its fiduciary duty to the plaintiffs by receiving secret profits.[119] However, these suits were dismissed on March 13, 1986 for failure to prosecute.[120] Notwithstanding, Wholey and Rogers filed almost identical complaints in the Chancery Court of Hinds County on April 2, 1986.[121]

On June 12, 1986, Cal-Maine filed motions for summary judgment based soley on their contention that the complaints were barred by the six-year statute of limitations set forth in section 15-1-49 of the Mississippi Code.[122] The chancellor granted the motions based on the statute of limitations and the additional ground that the suits were barred by the doctrine of res judicata.[123] The plaintiffs appealed and the two suits were consolidated.[124]

The Mississippi Supreme Court reversed and remanded, holding, *inter alia*, that the defense of res judicata may not be raised by a judge upon his or her motion.[125] After concluding that the ten-year statute of limitations found in Mississippi Code section 11-1-39 (1972) was the applicable statute of limitations,[126] the court addressed the issue of whether or not the chancellor erred in dismissing the cases upon an application of the doctrine of res judicata.[127] The court explained that

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[118] 530 So. 2d 136 (Miss. 1988).

[119] *Wholey*, 530 So.2d at 137. Wholey and Rogers were partners in an limited partnership which was managed by Cal-Maine. *Id.* The partnership was dissolved on December 31, 1978 because it was economically unsuccessful. *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* The court explained that by its own terms, the ten-year statute of limitations provided for in MISS. CODE ANN. § 11-1-39 (1972) was limited to cases involving the "existence of a trust not cognizable by the courts of common law. . . ." *Wholey*, 530 So. 2d at 139 (quoting MISS. CODE ANN. § 11-1-39 (1972)). Therefore, the court reasoned that the six-year statute of limitations would apply unless the action was purely equitable, in which case the ten-year statute of limitations would apply. *Wholey*, 530 So. 2d at 139. Citing MISS. CODE ANN. § 79-12-41 (1972), the court noted that every partner acts as a trustee of the partnership for any profits derived secretly. *Wholey*, 530 So. 2d at 140. Thus, the court held that since the cases involved the imposition of implied trusts, they were purely equitable actions and the ten-year statute of limitations applied. *Id.*

[127] *Wholey*, 530 So. 2d at 138-39.

Rule 8(c) of the Mississippi Rules of Civil Procedure requires that affirmative defenses, such as res judicata, must be affirmatively plead.[128] Citing *Bell v. First Columbus National Bank*,[129] the court stated that affirmative defenses are waived when they are neither plead nor tried by consent.[130] Therefore, emphasizing the fact that the issue of res judicata was raised for the first time in the chancellor's orders dismissing the cases, the court held that the chancellor erred in granting summary judgment on the basis of res judicata.[131]

VI. The Limits of Personal Jurisdiction

In order for personal jurisdiction to be proper against a defendant, it must be permitted under Mississippi's long-arm statute and the fourteenth amendment's due process clause.[132] The Mississippi Supreme Court confronted questions concerning these statutory and constitutional limitations in *Anderson v. Sonat Exploration Co.*[133] and *Wilkinson v. Mercantile National Bank at Dallas*.[134]

A. Anderson v. Sonat Exploration Co.[135]

The primary issue in *Anderson* concerned whether the defendant's acts of driving to Mississippi and having a document conveying real property executed and notarized were sufficient to enable a Mississippi court to exercise personal jurisdiction in a suit alleging deceit in the procurement of the document.[136]

Mrs. Edwina Anderson, a resident of Lamar County, Mississippi, was 86 years old when she decided to give real property interests in Louisana to her niece, Anita Ford Rudolph.[137] On October 23, 1981, Anita and her husband, both residents of Angie, Louisiana, drove to

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[128] *Id.* at 138.

[129] 493 So. 2d 964 (Miss. 1986).

[130] *Wholey*, 530 So. 2d at 138.

[131] *Id.* at 139. The court commented that ". . .none of the pleadings, discovery, motions, etc. reflected by the records in either case mention the prior filing by Wholey and Rodgers, their subsequent dismissal by Chancellor Alexander, or that such might be res judicata." *Id.* at 138.

[132] Wilkinson v. Mercantile Nat'l Bank at Dallas, 529 So. 2d 616, 618 (Miss. 1988) (citing Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982)).

[133] 523 So. 2d 1024 (Miss. 1988).

[134] 529 So. 2d 616 (Miss. 1988).

[135] *Anderson*, 523 So. 2d at 1024.

[136] *Id.* at 1025.

[137] *Id.* It was not clear exactly what interests Mrs. Anderson intended to convey to her niece. *Id.*

Mrs. Anderson's home and presented her with a document[138] for her to execute.[139] After presenting Mrs. Anderson with the document, the three of them drove to the chancery clerk's office in Purvis, Mississippi, where the document was properly executed by Mrs. Anderson and notarized by the deputy chancery clerk.[140]

Mrs. Anderson filed her bill on July 29, 1985, in the Chancery Court of Lamar County, alleging that Anita deceitfully presented her with a document that had the effect of conveying all of her interest.[141] However, the chancellor granted Anita's motion to dismiss for lack of personal and subject matter jursidiction.[142] Mrs. Anderson appealed.[143]

The Mississippi Supreme Court affirmed in part, reversed in part and remanded, holding, *inter alia*, that both the statutory and constitutional requirments for personal jurisdiction had been satisfied.[144] The court explained that the bill alleged that Anita committed the tort of deceit in Mississippi.[145] Therefore, citing section 13-3-57 of the Mississippi Code,[146] the court reasoned that since it was alleged that a tort

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[138] *Id.* The document was prepared by Anita's attorneys in Louisiana and on its face it stated that it was a "donation inter vivos." *Id.* The substance of the document purported to convey Mrs. Anderson's entire interest in some 210 acres of land located in Washington Parish, Louisiana. *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* The bill prayed that the gift be set aside or that the document be reformed to reflect her true intent, which she contended was to convey only part of the land while retaining all the mineral estate to herself. *Id.* The bill also joined Sonat Exploration Co. (Sonat) as the payor of certain mineral royalties owned by Anita out of which any damages and/or expenses of Mrs. Anderson were to be satisfied. *Id.* Upon Mrs. Anderson's application, the chancellor issued an order attaching any royalties payable to Anita from Sonat. *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1027. Addressing the issue of subject-matter jurisdiction, the court held that since the action was not a suit to try title, but rather an action for cancellation or reformation of an instrument, then Mississippi courts have subject-matter jurisdiction. *Id.* Citing Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454 (Miss. 1983), the court explained that where the suit is against the person of the defendant, the fact that the affected land is in Louisiana may make Louisiana law controlling under our "center of gravity" test, but it does not defeat the jurisdiction of our courts. *Anderson*, 523 So. 2d at 1027. Therefore, the chancellor erred insofar as he dismissed the bill for lack of subject-matter jurisdiction. *Id.*

[145] *Anderson*, 523 So. 2d at 1025.

[146] *Id.* Section 13-3-57 provides in part: "Any non-resident person . . . who shall . . . commit a tort in whole or in part in this state against a resident . . . shall by such act or acts be deemed to be doing business in Mississippi." MISS. CODE ANN. § 13-3-57 (Supp. 1988).

was committed in whole or part in Mississippi,[147] then personal jurisdiction was proper provided that the due process requirments of the United States Constitution were satisfied.[148]

Holding that Anita's acts of driving to Mississippi and having a document conveying real property executed and notarized constituted a "purposeful availment" similar to that found in the case of *Hertz Corp. v. Domerque*,[149] the court further concluded that "[a]nyone executing a legal document in a certain state should certainly not be surprised that any ligitation arising from it should be filed in that state."[150] Therefore, the court held that both the statutory and constitutional requirements for personal jurisdiction were satisfied.[151]

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[147] *Anderson*, 523 So. 2d at 1025. Citing Smith v. Temco, Inc., 252 So. 2d 212, 216 (Miss. 1971), the court explained that a tort is committed in part in Mississippi when an injury occurs in Mississippi. *Anderson*, 523 So. 2d at 1025.

[148] *Anderson*, 523 So. 2d at 1026. The court noted that due process requires that the defendant ". . . has certain minimum contacts within [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The court further observed that "[t]he due process analysis of personal jurisdiction has one other component, a foreseeability test deriving from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)." *Anderson*, 523 So. 2d at 1026-27. The court commented that a good discussion of these due process requirements appears in Administrators of the Tulane Educ. Fund v. Cooley, 462 So. 2d 696, 702-05 (Miss. 1984). *Anderson*, 523 So. 2d at 1026.

[149] 293 So. 2d 463 (Miss. 1974). In *Hertz*, a Mississippi citizen damaged a car he had rented in Nevada and refused to pay for the damage. *Id.* at 464. Hertz brought suit in Nevada, obtained a judgment and brought it to Mississippi to enforce. *Id.* Despite Domerque's challenge that the judgment of the Nevada court was not entitled to full faith and credit because Nevada's exercise of personal jurisdiction over him violated due process, the court held that the judgment was enforcable in Mississippi, reasoning that ". . . the execution of the lease contract and the ensuing use of the leased vehicle on the streets and highways of Nevada were not such a single and isolated contact as to prevent jurisdiction of the Nevada court from attaching." *Id.* at 466. The *Anderson* court explained that in *Hertz* they did not rely soley upon the use of the vehicle and that ". . . the language of the opinion implies that either the execution of the lease or the use of the car would constitute a sufficient contact." *Anderson*, 523 So. 2d at 1024.

[150] *Anderson*, 523 So. 2d at 1027.

[151] *Id.* As for the validity of the attachment order, the court stated that Mrs. Anderson's petition for an attachment order did not substantially comply with MISS. CODE ANN. § 11-31-1, *et seq.* (Supp. 1986) because her affidavit did not include reasons why her ability to recover the amount of her claim may be lost if attachment is not issued and it did not state the amount sought. *Anderson*, 523 So. 2d at 1027-28. Therefore, declaring that strict compliance with statutory procedures is required to employ attachment or garnishment because such proceedings are in derogation of the common law, the court held the chancellor's decree must be affirmed as to the dissolution of the attachment. *Id.*

B. Wilkinson v. Mercantile National Bank at Dallas[152]

The Mississippi Supreme Court addressed the issue of whether a Mississippi court could properly exercise personal jurisdiction over a national bank where the bank loaned funds to a gas drilling company and filed deeds of trust on real property located in Mississippi in *Wilkinson v. Mercantile National Bank at Dallas*.[153]

Tomlinson Interests, Inc. (Tomlinson), a Texas corporation qualified to do business in Mississippi, owned a working interest[154] in gas wells in the East Morgantown Field in Marion County, Mississippi.[155] To finance their development and operation of these gas wells, Tomlinson obtained a loan from the Merchantile National Bank at Dallas (MBank)[156] for $108,000,000.00, secured by a deed of trust covering Tomlinson's interest in the gas wells.[157]

Charles Wilkinson, a Mississippi resident, also owned interests in gas wells located in the East Morgantown Field.[158] Wilkinson, along with others who owned similar interests, filed suit alleging that Tomlinson and other operators had over-produced and that the plaintiffs were under-produced and entitled to all of the gas remaining until they produced enough to bring them into balance with the defendants.[159] In the event the pool of gas became depleted before the plaintiffs were brought into balance, the plaintiffs requested a money judgment in order that a cash balancing might be achieved.[160] Alleging that MBank had received monies which were attributable to Tomlinson's selling of the over-production, plaintiffs' initially requested that MBank be re-

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[152] 529 So. 2d 616 (Miss. 1988).

[153] *Wilkinson*, 529 So. 2d at 616.

[154] *Id.* The term "working interest" refers to the leasee's operating interest under an oil and gas lease. WILLIAMS AND MEYERS, OIL AND GAS TERMS, 979 (6th ed. 1984). For example, "[i]n the simple situation of a lessor who executes a lease, reserving ⅛th royalty . . . the working interest consists of ⅞th of production subject to all costs of exploration and development . . . ." *Id.* at 979-80.

[155] *Wilkinson*, 529 So. 2d at 617

[156] *Id.* MBank is a national banking association organized under the laws of the United States of America, with its principal place of business in Dallas, Texas. *Id.* In consumating the loan to Tomlinson, MBank acted as an agent for a consortium of banks. *Id.*

[157] *Id.* In addition to executing a deed of trust, Tomlinson granted MBank ". . . a security interest in Tomlinson's share of the field and. . .the right to an assignment of Tomlinson's share of production from the field." *Id.*

[158] *Id.* at 617.

[159] *Id.* The plaintiff's allegation of overproduction was based upon operating agreements and a Gas Balancing Agreement. *Id.*

[160] *Id.*

quired to disgorge all such monies in order to provide a fund for cash balancing, in the event cash balancing was necessary.[161] However, plaintiffs' amended complaint alleged that MBank willfully converted monies which MBank knew did not belong to it or any of the other defendants by refusing to recognize the plaintiffs' interests in the monies which were attributable to the selling of the over-production.[162]

MBank specially appeared and moved to dismiss the action as to them for lack of personal jurisdiction.[163] The chancellor sustained their motion and dismissed them as a defendant to the suit.[164] Wilkinson appealed.[165]

The Mississippi Supreme Court reversed and remanded, holding that both the statutory and constitutional requirements for personal jurisdiction had been satisfied.[166] Confronting the statutory requirments, the court observed that section 81-5-41 of the Mississippi Code provides that any national banking association that invests funds in Mississippi may sue or be sued in actions relating to such investments.[167] The court reasoned that section 81-5-41 may be viewed as a separate long-arm statute or as ". . . extending the *doing business* provision of section 13-3-57 to include the activities described in section 81-5-41."[168] Therefore, since the action against MBank related to its investments in Mississippi, personal jurisdiction was proper under our statutes.[169]

Examining whether the assertion of personal jurisdiction over MBank would be consistent with due process, the court concluded that MBank had "purposefully availed itself of the protection of Mississippi law" by filing financing statements and a deed of trust in order to protect itself against a default by Tomlinson.[170] The court also adopted

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 617-18.

[165] *Id.* at 618.

[166] *Id.* at 620.

[167] *Id.* at 618.

[168] *Id.* at 618.

[169] *Id.* Additionally, the court observed that the complaint alleged that MBank committed the tort of conversion. *Id.* Despite MBank's argument that no tort was committed in Mississippi because no money was exchanged in Mississippi, the court explained that a tort occurs in this state if the damage occurs in this state. *Id.* (citing Smith v. Temco, 252 So. 2d 212 (Miss. 1971)). Therefore, the court reasoned that since plaintiffs alleged that an injury occurred in this state, MBank allegedly committed a tort in Mississippi and personal jurisdiction was proper under our long-arm statute. *Id.*

[170] *Id.* at 619.

and applied the rule from the Fifth Circuit that "[w]hen a non-resident takes 'purposeful and affirmative action,' the effect of which is 'to cause business activity, foreseeable by [the defendant], in the forum state,' such action by the defendant is considered a 'minimum contact' for jurisdictional purposes."[171] Therefore, the court held that both the statutory and constitutional requirements for personal jurisdiction were satisfied.[172]

Ronald Henry Pierce

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[171] *Id.* at 620 (quoting Mississippi Interstate Express Inc. v. Transp., Inc., 681 F.2d 1003, 1007 (5th Cir. 1982)).

[172] *Id.* at 620.

CORPORATE, CONTRACT AND COMMERCIAL LAW

Given the task of deciding the ultimate outcome of the profusion of legal issues presented before it during 1988, the Mississippi Supreme Court responded admirably to its docket of cases involving the areas of contract and commercial law. Among the various disputes resolved were those concerning the enforceability of an oral "booking" contract,[1] failure to use reasonable care in the custody and preservation of collateral,[2] breach of express warranty and implied warranty of merchantability,[3] banks right to set-off,[4] oral modification and waiver of contract provisions,[5] proof of damages for breach of contract,[6] buyer's damages for breach of contract,[7] requirements for rescission of a contract on the theory of fraud,[8] Visa/Mastercard merchant agreements,[9] fiduciary duty of pledgor to pledgee,[10] the enforceability of a

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[1] Gooch v. Farmers Market Assoc., 519 So. 2d 1214, 1217-18 (Miss. 1988) (oral "booking" contract, although unsigned by party sought to be charged, will be enforced as valid contract as long as course of dealing can be established between parties which evidence binding contract).

[2] Cain v. Robinson, 523 So. 2d 29, 33-34 (Miss. 1988) (where secured party fails to use reasonable care in custody and preservation of collateral in his possession, breach of duty to use reasonable care will be found).

[3] Fitzner Pontiac-Buick-Cadillac v. Smith, 523 So. 2d 324, 326-28 (Miss. 1988) (in order to find breach of express warranty, court must determine that claimed warranty was part of basis of bargain; reasonable opportunity to remedy defects must be allowed before breach of implied warranty of merchantability will be found).

[4] DGNB v. Simrall, 524 So. 2d 295, 300-02 (Miss. 1988) (bank, having knowledge of fiduciary relationship between its depositor and third party, may not set-off such funds against depositor's indebtedness to bank).

[5] Eastline Corp. v. Marion Apt., 524 So. 2d 582, 584 (Miss. 1988) (when owner's acts or conduct evidences knowledge of, agreement to, or acquiescence in work not approved by written agreement as required by contract, waiver of required written agreement may be found).

[6] Eastland v. Gregory, 530 So. 2d 172, 174-75 (Miss. 1988) (where no evidence is presented at trial which substantiates damages claimed to have been caused by breach, no award of damages shall be received).

[7] Guerdon Indus., Inc. v. Gentry, 531 So. 2d 1202, 1208-09 (Miss. 1988) (absent proof of consequential damages, damages buyer may recover for breach of warranty is limited to purchase price of goods).

[8] Ezell v. Robbins, 533 So. 2d 457, 461 (Miss. 1988) (in order to rescind contract on charge of fraud, one must prove by clear, convincing evidence those elements required in order for trial court to order rescission).

[9] First United Bank v. Philmont Corp., 533 So. 2d 449, 455 (Miss. 1988) (until deposits of credit card sales slips are provisionally credited to account, depositary bank is under no duty to make funds available to depositor).

covenant not to appeal,[11] accommodation endorser's right to collect from guarantor of a promissory note,[12] right of a corporation to maintain suit filed before certificate of authority to do business within the state was suspended,[13] and the enforceability of contract rights of a discharged officer or employee of a corporation.[14]

I. General Contract Principles

A. *Mutual Mistake*

Simply put, a mistake which occurs in the formation, performance or discharge of a contract, if "common to both parties (to the written instrument) and by reason of it each has done what neither intended,"[15] is deemed to be a mutual mistake and the courts generally will allow its reformation or rescission.[16] This remedy was sought by the appellant in *Taylor v. Firestone Tire & Rubber Co.*,[17] based upon a disputed settlement agreement.

In June of 1984, Mary Taylor, a customer of the Firestone Tire & Rubber Co., slipped and fell while on the premises and sustained minor injuries.[18] Taylor sought the advise of counsel and approximately four months later, tendered a settlement demand to Firestone.[19] This original demand was for $5,000, $350 of which constituted medical

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[10] Gibson v. Manuel, 534 So. 2d 199, 202-04 (Miss. 1988) (pledgor/officer owes pledgee same fiduciary duties of loyalty and care that officer or director of corporation owes to its shareholders).

[11] Nobile v. Nobile, 535 So. 2d 1385, 1387-88 (Miss. 1988) (agreement not to appeal, or release of right to prosecute writ of error, if entered into by competent parties and supported by adequate consideration, is valid and binding).

[12] Comfort Engineering Co., Inc. v. Kinsey, 523 So. 2d 1019, 1021-22 (Miss. 1988)(accommodation endorser of promissory note is entitled to collect entire balance of note from guarantor of note provided that accommodation endorser has satisfied payment of indebtedness to holder).

[13] Capital Assoc., Inc. v. Sally Southland, Inc., 529 So. 2d 640, 644 (Miss. 1988) (corporation is entitled to maintain suit where said suit was filed before corporation's certificate of authority to do business within state was suspended and did not have to have certificate reinstated as condition to proceeding to trial).

[14] Short v. Columbus Rubber & Gasket Co., 535 So. 2d 61, 65 (Miss. 1988) (while corporation's board of directors may be empowered to remove officer or director at will, contract rights which exist between discharged officer or employee and corporation may not be disregarded with impunity).

[15] 13 S. Williston, Williston on Contracts § 1535 (Jaeger ed. 1970) (quoting Ward v. Lyman, 108 Vt. 464, 188 A. 892 (1937)).

[16] *Id.*

[17] 519 So. 2d 436 (Miss. 1988).

[18] *Taylor*, 519 So. 2d at 436.

[19] *Id.*

bills.[20] Firestone responded with an offer to settle the case for $1,500, inclusive of the $350 in medical bills, but contended that the offer, while acknowledging that Taylor had in fact been injured in the store, was not presented in recognition of any liability.[21]

While this offer was subsequently rejected by Taylor, an oral offer to settle the personal injury claim for $2,000 was conveyed to Firestone by Taylor on February 25, 1985.[22] Firestone accepted this offer two days later through a letter which was accompanied by a check for the requested amount as well as a release form to be signed by Taylor.[23] Taylor did not execute this release nor did she cash the check, although she retained both. Taylor was subsequently hospitalized due to back pain and osteoarthritis, incurring medical bills which totaled $4,669.50.[24]

In October of 1985, Taylor returned the unexecuted release form along with the bank draft that had not been cashed, stating that the minimum settlement demand was now $18,000 and that if no contact was made by Firestone, Taylor would institute legal proceedings.[25] As a result, Firestone filed suit[26] seeking declaratory and injunctive relief, and specific performance of the settlement agreement.[27] The chancellor found that the transactions between Taylor and Firestone amounted to a valid offer and acceptance of the settlement agreement and that the agreement was enforceable.[28] He subsequently ordered Taylor to honor the agreement and declared that this would constitute res judicata thus barring any further claims and causes of action arising out of the incident.[29]

On appeal, Taylor claimed that the settlement agreement should be declared invalid as it was based on a mutual mistake by both parties during the negotiation process.[30] She contended that the $2,000 offer made to Firestone was accepted by Firestone due in part to a

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* Taylor returned Firestone's unexecuted release form and unsigned check on October 10, 1985 and specifically stated: "Our minimum settlement demand is $18,000. If we do not hear from you by October 21, 1985, we will assume that you do not wish to settle this matter and will prepare a lawsuit." *Id.*

[26] *Id.* at 437. The suit was filed in the Chancery Court of Hinds County. *Id.*

[27] *Id.*

[28] *Id.*

[28] *Id.*

[30] *Id.* at 437-38.

consideration of the medical expenses incurred up to that time.[31] She furthered her argument by stating that the additional medical expenses incurred due to her subsequent hospitalization were not considered.[32] Taylor claimed that since these expenses were not included in the element of medical expenses inherent in the agreement, both parties were mistaken in regard to this element and that the agreement should be declared invalid due to mutual mistake.[33]

Upon reviewing the testimony of the only witness who testified at the trial of this case, William H. Cox, Jr., the attorney for Firestone who had negotiated the settlement agreement, the Mississippi Supreme Court was convinced that while Firestone had consistently denied any liability for the incident, the settlement agreement was the product of Firestone's desire to buy its peace and that no mistake had been made by Firestone as to its reason for accepting Taylor's offer.[34] It was further noted by the court that while the release form was returned unexecuted, Taylor had stipulated that a settlement agreement had been reached.[35] The court found that no evidence had been presented which would support a finding that Firestone had been mistaken in its reasons for accepting the settlement offer, and further, that any mistake made was unilateral in nature on Taylor's part for which

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* The Mississippi Supreme Court analogized this contention with that established in a similar case, Pearson v. Weaver, 252 Miss. 724, 173 So. 2d 666 (1965). The court stated:

> [w]here a defending party disclaims any liability in an action and settles simply to buy peace, not to compensate any injuries the plaintiff received, the fact that such plaintiff's injuries were subsequently found to be more serious than when he executed a release cannot give rise to a claim of mutual mistake.

Taylor, 519 So. 2d at 438 (Miss. 1988) (summarizing holding in *Pearson*, 252 Miss. at 731, 173 So. 2d at 669).

For extensive coverage of this reasoning, see Fornea v. Goodyear Yellow Pine Co., 181 Miss. 616, 178 So. 914 (1938); Gunter v. Henderson Molpus Co., 149 Miss. 603, 115 So. 720 (1928); Continental Jewelry Co. v. Joseph, 140 Miss. 582, 105 So. 639 (1925).

[35] *Taylor*, 519 So. 2d at 438. The stipulations made by Taylor during the trial were as follows:

> (1) Issac Byrd, counsel for Taylor, had full power and consent to negotiate the settlement agreement;
>
> (2) an oral offer was made on February 25, 1985 by Byrd for Taylor to settle her personal injury claim for $2,000;
>
> (3) the offer was accepted by Firestone through a letter dated February 27, 1985 and a bank draft and release were forwarded to Byrd from Cox, Firestone's attorney.

Id. at 437.

no relief was forthcoming in the absence of any evidence of fraud, duress, overreaching, etc.[36] Finding no mutual mistake as to the element of subsequent medical expenses, the Mississippi Supreme Court affirmed the decision of the lower court.[37]

B. Conflict of Interest

In the seminal case of *Smith v. Dorsey*,[38] the Mississippi Supreme Court determined that teaching contracts extended by county school board officials to their spouses constituted a conflict of interest and were specifically prohibited by section 109 of the Mississippi Constitution.[39]

Following recommendations made by Dr. John Noble, the Claiborne County Superintendent of Education, the Claiborne County School Board extended teaching contracts to spouses of members of the school board.[40] As a result, several taxpayers in Claiborne County brought an action seeking declaratory and injunctive relief against the school board.[41] The chancellor, upon review of the evidence, declared that the contracts entered into with the spouses of the school board's members were null and void.[42] This order was based upon the chancellor's belief that section 109 of the Mississippi Constitution prohibited such contracts as "each defendant had an indirect interest in these contracts as he had been a Trustee of the Claiborne County Board of Education when said Board approved one or more contracts for the

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[36] *Id.* at 438. *See also* 15A C.J.S. *Compromise & Settlement* § 36 (1967) (requirements for invalid contract due to unilateral mistake).

[37] *Taylor*, 519 So. 2d at 438.

[38] 530 So. 2d 5 (Miss. 1988).

[39] *Dorsey*, 530 So. 2d at 9. *Cf.* Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987). In *Frazier*, the Mississippi Supreme Court held that no conflict of interest existed between an individual serving in the legislature and their voting on general public school laws when their spouse was employed as a public school teacher. The *Frazier* court, in interpreting section 109 of the Mississippi Constitution, found that this section was not intended to prohibit circumstances represented by those present in the *Frazier* case. *Frazier*, 504 So. 2d at 705.

[40] *Dorsey*, 530 So. 2d at 6. The Claiborne County School Board officials originally named as defendants were Jimmy Smith, Daniel Jennings, Calvin C. Williams and Bennie Knox. *Id.* The contracts for teaching positions were extended to Anne Collins Smith, Mary Jennings, Ernestine Williams and Catherine Knox. *Id.*

Two separate sources of funds were identified by Dr. John Noble as providing the salaries for the prospective teachers. *Id.* These were local funds and the State Minimum Program Fund. *Id.*

[41] *Id.* at 5. The suit was filed in the Chancery Court of Claiborne County. *Id.*

[42] *Id.* at 6.

employment of the defendants' spouses."[43] The chancellor went on to order that claims of restitution be entered against the spouses in light of the section 109 infractions.[44] Subsequent to this decision, the defendants appealed.

Section 109 of the Mississippi Constitution states in pertinent part:

> No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.[45]

The Mississippi Supreme Court, interpreting the application of this section in a similar but distinguishable set of circumstances,[46] declared that this section "prohibits any officer from: (a) having any direct or indirect interest in any contract (b) with the state or any political subdivision (c) executed during his term of office or one year thereafter, and (3) authorized by any law, or order of any board of which he was a member."[47] The court declared that upon application of these factors, there was no question that each defendant in the instant case had "some manifest interest . . . in the public school employment contracts of their wives."[48] The court noted such direct involvement as the defendants' responsibility in the hiring and firing of their spouses as well as a finding that the school board members made authoritative decisions as to the salaries which were awarded to the public school teachers within their district.[49] Based upon these findings the court conclusively affirmed the chancellor's decision which found

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[43] *Id.*

[44] *Id.* The chancellor found that the contracts which violated section 109 of the Mississippi Constitution had been effective for several years "up to and including the present date." *Id.*

[45] MISS. CONST. art. IV, § 109.

[46] Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987). *See supra* note 36.

[47] *Dorsey*, 530 So. 2d at 6 (quoting Frazier v. State by and through Pittman, 504 So. 2d at 693).

[48] *Id.* at 7.

[49] *Id.* The court made it very clear that the recognition of these interests was not to be construed as a questioning of the integrity or fairness of the defendants but that the contacts which existed amounted to an indirect interest which violated section 109 of the Mississippi Constitution. *Id.*

the contracts in question to be in violation of section 109 of the Mississippi Constitution.[50]

While the court affirmed the finding of the chancellor regarding the violation of section 109 of the Mississippi Constitution, it reversed the trial court's order of restitution.[51] In following its reasoning espoused in a previous action,[52] the court stated that no showing of bad faith existed and value for the services performed by the teachers had been received. The court stated that an award of restitution in this case would basically amount to an award of punitive damages and that "absent a showing of bad faith, or even proof of loss," it would be improperly given.[53]

In a specially concurring opinion, Justice Prather stated that the primary intent of the constitutional framers was "to prevent public officers' judgment from being influenced for personal benefit or private gain."[54] In light of this intent and the rationale previously provided by the court,[55] Justice Prather proposed a three-prong test which should be applied in order to determine if a direct interest was in fact present.[56]

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[50] *Id.* The court likened their holding to that made by the Kentucky Supreme Court in Commonwealth v. Withers, 266 Ky. 29, 98 S.W.2d 24, 25 (1936) wherein it was stated:

> It is a salutary doctrine that he who is intrusted with the business of others cannot be allowed to make such business as object of profit to himself. This is based upon principles of reason, of morality, and of public policy. These are principles of the common law and of equity which have been supplemented and made more emphatic by the foregoing and other statutory enactments.

Id. See also Frazier, 504 So. 2d at 700 (same).

[51] *Dorsey*, 530 So. 2d at 9.

[52] *See* Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906, 907-08 (1942)(public official in performance of duty who relies in good faith on statute later declared unconstitutional by court should not be held civilly liable); Frazier v. State by and through Pittman, 504 So. 2d 675, 704 (Miss. 1987)(same).

[53] *Dorsey*, 530 So. 2d at 8.

[54] *Id.* at 9 (Prather, J., specially concurring).

[55] *See* Frazier v. State by and through Pittman, 504 So. 2d 675, 704 (Miss. 1987)(one who violates constitution in good faith reliance upon statute which specifically allows the unconstitutional conduct may assert the statute as defense to award of damages).

[56] *Dorsey*, 530 So. 2d at 14 (Prather, J., specially concurring). The test proposed by Justice Prather is as follows:

> 1. Does the board member have absolute discretion in the employment or other contract interests?
>
> 2. Is the pecuniary benefit bestowed the result of inclusion in the general class?
>
> 3. Is the benefit insignificant or remote (even if included in a class)?

Id. In applying this test to the instant facts, Justice Prather determined that a violation of section 109 did in fact exist and that as a result, she concurred with the majority

Justice Sullivan, in a scathing dissent, opined that the chancellor was absolutely correct in ordering restitution and that as a result he found the majority opinion to be erroneous.[57] This stance was based upon Justice Sullivan's belief that any violation of section 109 was to result in liability on the part of the violator and such liability was clearly established by judicial precedent.[58] He noted that while a narrow exception existed in cases where one violates the Mississippi Constitution in good faith reliance upon a statute which specifically authorizes the unconstitutional act,[59] the instant ruling did not present such a scenario.[60] He further expressed his objection to the majority opinion by stating:

> [t]he majority by pretending that the restitution here is punitive damages now requires that litigants who succeed in showing the violation of the constitution must also assume the added burden of showing that the constitution was violated in bad faith. If mental gymnastics were on the agenda in the olympic games, the majority would certainly come home with the gold.[61]

This language was again supplemented by Justice Sullivan as he declared that the payments made by the Claiborne County School Board to the teachers who were spouses of the members of the board were "so 'clearly and distinctly' unlawful that the appellants' claim of good faith should be barred."[62] In closing, Justice Sullivan implored the court to follow and uphold the Mississippi Constitution as it is bound to do and to avoid ignoring its principles by "applying principles of equity to uphold an illegal and unconstitutional contract."[63]

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opinion and would affirm the lower court on this issue. *Id.*

[57] *Id.* at 15 (Sullivan, J., dissenting).

[58] *Id. See* Golding v. Salter, 234 Miss. 567, 107 So. 2d 348, 356 (1958)(unauthorized expenditures by county hospital board of trustees are recoverable by state auditor); Miller v. Tucker, 142 Miss. 146, 105 So. 774, 780-81 (1925)(board of supervisors liable for unauthorized expenditures).

[59] Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987); Golden v. Thompson, 194 Miss. 241, 11 So. 2d 906 (1943).

[60] *Dorsey*, 530 So. 2d at 15 (Sullivan, J., dissenting).

[61] *Id.*

[62] *Id.* at 17. *See* Golding v. Salter, 234 Miss. 567, 595, 107 So. 2d 348, 360 (1958)(rejection of "good faith" defense).

[63] *Dorsey*, 530 So. 2d at 18 (Sullivan, J., dissenting).

C. Arbitration and Award

In *Craig v. Barber*,[64] the Mississippi Supreme Court addressed the legal obligation of arbitrators to give or produce the basis or reasons for the awards granted in the absence of a contractual agreement.[65] Justice Robertson, writing for the court, stated that absent a contractual agreement to the contrary, arbitrators are under no legal obligation to provide the basis or reasons for the awards granted.[66]

Succinctly stated, a construction contract had been entered into by Carl and Nancy Herrin (hereinafter Herrins) and Milton Stewart, Inc. (hereinafter Stewart) whereby certain home improvements were to be made to the Herrins' home.[67] Contained within the contract was an arbitration clause which provided for the orderly resolution of any claims or disputes which might arise during the course of the work to be performed.[68] Unfortunately, a dispute over the work performed did in fact arise which led to a demand for arbitration being filed by Stewart with the American Arbitration Association (hereinafter AAA).[69] Following a five day hearing, Charles F. Craig, the arbitrator appointed by the AAA, entered a written award which provided for payment by Stewart to the Herrins the sum of $48,813.00.[70] Seeking a confirmation of the arbitration award, the Herrins filed a complaint in circuit court.[71] In answering the complaint, Stewart defended on the ground

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[64] 524 So. 2d 974 (Miss. 1988).

[65] *Craig*, 524 So. 2d at 975.

[66] *Id.* at 975-76.

[67] *Id.* at 975.

[68] *Id.* The provision read:

> 21. All claims and disputes between the contractor [Stewart] and the owner [the Herrins] arising out of, or relating to, the contract documents or the breach thereof shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

Id.

[69] *Id.* This demand, filed December 17, 1984, was for $36,937.73 in additional compensation claimed by Stewart to have resulted from change orders. The Herrins disputed all of the additional compensation claimed except $9,506.40 and counterclaimed for $56,049.04. *Id.*

[70] *Id.* The award also denied the claims advanced by Stewart and declared that all administrative fees and expenses be split between the respective parties. *Id.* For further authority, see MISS. CODE ANN. §§ 11-15-199 and -121 (Supp. 1987).

[71] *Id.* The suit was filed in the Circuit Court of the First Judicial District of Hinds County. *Id.* The complaint was based upon MISS. CODE ANN. § 11-15-125 (Supp. 1988) which requires the court, upon application by a party to the arbitration filed within 90 days of the receipt of a copy of the award to confirm or vacate the award. MISS. CODE ANN. § 11-15-125 (Supp. 1988).

that the arbitrator, Charles F. Craig, suffered from "evident partiality."[72] In order to support this defense, Stewart sought to depose Craig; however, the circuit court "ordered that Craig 'explain and clarify' the basis of his award."[73] Following this order, Craig applied to the Mississippi Supreme Court for a writ of prohibition to grant relief from the court order.[74]

The Mississippi Supreme Court converted and treated the writ of prohibition as an interlocutory appeal.[75] As such, the court reviewed Craig's claim for relief from the order as well as directed the circuit court to proceed without any further evidence of his basis or reasons for the arbitration award.[76] The court reviewed both the AAA's Guide for Commercial Arbitrators and the applicable Mississippi statute and ruled that "absent contractual agreement to the contrary, arbitrators have no legal obligation that the basis or reasons for the award be given."[77]

Stating that as a matter of public policy the State of Mississippi has supported and allowed parties to submit their disputes to an arbitrator and to give effect to the subsequent award, the court reasoned that such a stance should be strictly adhered to especially in light of the present state of overcrowded judicial dockets.[78] This encourage-

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[72] *Craig*, 524 So. 2d at 975. This defense of partiality advanced by Stewart is provided for in § 11-15-133(1)(b) of the Mississippi Code. *Id.* This provision in the Code instructs the court to vacate an award, upon application of a party, where "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." MISS. CODE ANN. § 11-15-133(1)(b) (Supp. 1988).

[73] *Craig*, 524 So. 2d at 975, n.2. The circuit court ordered that the deposition subpoena be quashed but subsequently ordered that Craig prepare "findings of fact setting forth therein all the facts on which he based his arbitration award dated May 13, 1985." *Id.*

[74] *Id.* at 975.

[75] *Id.* at 976. The court noted that the instant case had been docketed before "the advent of the new Rules of the Supreme Court of Mississippi, effective January 1, 1988 . . . . [and further that] [n]othing said here should be taken as an authoritative construction of new Rule 5 (interlocutory appeals) or new Rule 21 (extraordinary writs)." *Id.* at 976, n.3. *See also* Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163, 1164 (Miss. 1987)(writ of mandamus or other extraordinary relief petition seeking order requiring circuit judge to vacate certain orders); American Tobacco Co. v. Evans, 508 So. 2d 1057, 1059 (Miss. 1987)(writ of prohibition is extraordinary proceeding which traditionally prohibits inferior judge from improperly exercising jurisdiction).

[76] *Craig*, 524 So. 2d at 976.

[77] *Id. See* MISS. CODE ANN. § 11-15-119 (Supp. 1988)(nature of remedy which arbitrators may grant); Rule 42, Construction Industry Arbitration Rules of the American Arbitration Association (same).

[78] *Craig*, 524 So. 2d at 977.

ment was supplemented by the court's endorsement of the recent Construction Arbitration Act.[79] Further support for arbitration agreements was recited by the court in its review of past decisions.[80] Finally, the court stated that Craig, in his capacity as arbitrator, was acting under the rules of the American Arbitration Association and as such was not required to provide separate findings on each matter.[81]

In addressing the error of the circuit court in its belief that the defense of "evident partiality" must be reviewed through the basis of the arbitrator's decision, the Mississippi Supreme Court analogized the instances where a jury's decision is attacked on grounds of particularity.[82] It found that such a review is based upon "what was before the trial court on the motion to recuse" rather than an examination into the legal or factual basis for the judge's decision.[83] In closing, the court found that while the circuit court had correctly quashed Stewart's deposition subpoena, it had indirectly circumvented this order by requiring Craig to disclose his basis or reasons for the award.[84] Finding such an order to be contrary to generally accepted principles of arbitration as well as Mississippi law, the court granted the writ of prohibition.[85]

D. Doctrine of Merger

Upon review of an action brought by purchasers of real property for rescission of the deed, promissory note and deed of trust on the grounds that the seller had breached the real estate contract, the Mississippi Supreme Court adopted the majority view that certain preliminary stipulations concerning the sale of realty which are independent and collateral to the sale survive the merger of previous negotiations into the deed and confer independent causes of action.

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[79] *Id. See* MISS. CODE ANN. §§ 11-15-101 to -143 (Supp. 1988)(1981 enactment providing guidelines and enforcement of arbitration agreements).

[80] In Hutto v. Jordon, 204 Miss. 30, 36 So. 2d 809 (1948), the Mississippi Supreme Court held:

> Article of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.

Jordan, 204 Miss. at 42, 36 So. 2d at 812.

[81] *Craig*, 524 So. 2d at 976.

[82] *Id.* at 978.

[83] *Id. See* Cantrell v. State, 507 So. 2d 325, 328 (Miss. 1987)(request for recusal based upon review of judge's connections to parties involved or preconceived opinions).

[84] *Craig*, 524 So. 2d at 978.

[85] *Id.*

The case, *Knight v. McCain*,[86] turned on the interpretation of the doctrine of merger which provides that previous negotiations or contracts merge into a deed of conveyance.[87] Generally stated, "the acceptance of a deed tendered in the performance of a contract to convey land merges or extinguishes the covenants and stipulations contained in the contract . . . ."[88] The facts of the case supplied the court with the appropriate circumstance under which to adopt the majority rule previously adopted by thirty-seven jurisdictions.[89]

In November of 1984, Frank and Denise McCain entered into a tentative agreement to purchase a residential lot from Ben Johnson, a real estate developer who was selling lots in a subdivision he owned commonly known as Timberlake Place Subdivision.[90] During the negotiations concerning the sale, the McCains learned that certain problems had arisen in securing building permits on the property.[91] Johnson acknowledged these problems and guaranteed the McCains that in the event any problems were encountered, he "would refund all (their) money and it would not cost a dime to own the property."[92] Johnson, in light of this statement, included a provision in the contract to the same effect.[93]

The contract for sale was subsequently signed at which time the McCains tendered a check for $10,000 to Johnson who requested that the check be made payable to James T. Knight, Johnson's attorney.[94] Four days later, Ben Johnson died.[95] Johnson's wife contacted the McCains and advised them that Knight would contact them, which he did. Unknown to the McCains at the time was the fact that Knight held the deed to the property as security for a loan made to Johnson

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[86] 531 So. 2d 590 (Miss. 1988).

[87] *See* West v. Arrington, 183 So. 2d 824, 827 (Miss. 1966)(reservation in deed sufficient to except reserved mineral interest from conveyance of realty); Brown v. King, 214 Miss. 437, 58 So. 2d 922, 923 (1952)(same).

[88] *Knight*, 531 So. 2d at 595 (quoting 77 AM. JUR. 2d, *Vendors & Purchasers*, § 291 (1975).

[89] *Id.*

[90] *Id.* at 591-92. The McCains agreed to purchase a 12-acre lot from Johnson for $50,000. The agreement called for a $10,000 down payment and the remaining balance of $40,000 to be owner-financed. *Id.* at 592.

[91] *Id.*

[92] *Id.*

[93] *Id.* The provision read: "In the event county does not issue building permit, all monies will be refunded." *Id.*

[94] *Id.*

[95] *Id.*

by Knight.[96] This loan was not repaid by Johnson but was repaid by Knight out of his personal profit sharing plan.[97] As a result, Knight regarded the property as his own.[98]

Knight used the sales contract entered into by the McCains and Johnson to form a note, deed and deed of trust. In April, Knight signed the deed and the McCains signed the note and deed of trust.[99] In February, concerned over potential problems with gaining a building permit, the McCains independently sought an answer from the Building and Permit Department.[100] After being advised that no permit would be forthcoming, the McCains contacted Knight who again assured them that they would be able to get a permit and that in the event they did not get a permit, he would refund their down payment and other principal payment but not the interest.[101] Although one payment had been made, the McCains did not remit the second payment based upon their belief that they would not be able to recover the interest in the event the building permit was denied.[102] Knight subsequently agreed to extend the time limits in order to allow the McCains to obtain a building permit. Knight offered to provide the McCains with free legal service to aid them in their quest for a permit and agreed in writing to refund the down payment as well as payments of principal and to reimburse them for the cost of the house plans up to $1,000 but again stated that no interest would be returned to them.[103]

Unhappy with Knight's refusal to refund interest payments in light of their inability to secure a building permit, the McCains retained counsel who demanded that Knight repurchase the property pursuant to the original contract for sale entered into by the McCains and Johnson;[104] however, Knight only offered to repurchase the property for the principal amounts already paid by the McCains. During this time the McCains independently sought to obtain a building permit but these attempts failed.[105] Knight subsequently instituted fore-

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[96] *Id.*

[97] *Id.* at 591.

[98] *Id.*

[99] *Id.* at 592. The evidence showed that the McCains believed that Knight was merely acting as the attorney for the Johnson estate and that "they were purchasing the property from the estate." *Id.*

[100] *Id.* at 593.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* The McCains had been advised by a Mr. Gholson with the Building and Permit Department of the Hinds County Board of Supervisors that no permit would be

closure proceedings against the McCains.[106] The McCains responded by filing a complaint against Knight as trustee for Knight & Knight Retirement Trust for breach of contract and asked that all monies be refunded as well as cancellation of the deed and note and payment of attorney's fees.[107] Along with this complaint, the McCains sought a preliminary injunction from the court to prevent the foreclosure proceedings.[108] The chancellor granted the injunction.[109] Knight answered the complaint and filed a motion for summary judgment based upon two separate grounds. First, he sought to have the court declare that "no agency existed between Johnson and himself and second, that even if an agency relationship existed, the real estate sales contract had merged into the deed and was no longer applicable."[110] The chancellor rejected these claims and cancelled the deed, note and deed of trust, holding that Knight was bound by the sales contract and that it was breached upon his refusal to repurchase the land and refund all monies paid.[111] From this decision, Knight appealed.

Knight contended that (1) the chancellor had erred in finding as a fact that he had adopted or become bound by the contract between the McCains and Johnson and (2) that even if he was bound by their contract, the chancellor erred in failing to apply the doctrine of merger to hold that a pre-existing agreement is merged into a deed and may not be separately enforced.[112]

Upon review of these assignments of error, the Mississippi Supreme Court found substantial merit in the appellee's argument that the majority rule, followed by thirty-seven jurisdictions, should be adopted by Mississippi. This rule holds that collateral or independent agreements, which are to be performed subsequent to the conveyance, are not merged into the deed of conveyance.[113] The court reviewed the factual situation facing it in the instant case and found that an amendment to the contract or an independent stipulation existed whereby the full purchase price would be refunded if a building permit could

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extended as no central water supply system was available on the property. *Id.* The McCains then contacted the Board of Supervisors to obtain a waiver of the requirement for approval of a well. This was denied. *Id.* at 539-94.

[106] *Id.* at 594.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 594.

[113] *Id.* at 595. For a detailed listing of pertinent cases decided in these jurisdictions, see *Knight*, 531 So. 2d at 595, n.1.

not be obtained.[114] As the court stated, "[s]ince the purpose of buying this property was for residence construction, the inability to secure a building permit eliminates the purpose for which the conveyance was executed."[115] Thus, finding the instant facts to provide the opportunity to address this issue of agreements collateral to or independent of the subsequent deed, the court adopted the collateral agreement exception followed by the vast majority of jurisdictions.[116] The Mississippi Supreme Court also found that by his actions, Knight had adopted the sales contract as his own and was therefore equitably estopped from denying that he was not bound by the terms of the real estate sales contract.[117] The court likewise upheld the award by the chancellor of attorney's fees as provided in the contract.[118] However, the court declared that while the trial court had included an award of $350 for bulldozer work done on the property and $1,364.57 for pre-judgment interest, these items were not a part of the sales contract and that therefore the chancellor's decision in this respect should be reversed.[119] Accordingly, the decision of the chancellor was affirmed in part and reversed as to the bulldozer work and pre-judgment interest.[120]

II. Banks and Banking

A. Guaranty

In *Atkinson v. National Bank of Commerce*,[121] the Mississippi Supreme Court addressed the right of a creditor to maintain a suit against the principal obligor of a note upon default although partial payment had been effectuated by a guarantor. The scenario giving rise to this action began to unfold in July of 1982 when Peter and Norma Atkinson sought financial assistance from the National Bank of Commerce of Mississippi (hereinafter NBC) in order to supplement the operating capital needed for their business in Amory, Mississippi.[122] NBC advanced $20,691.92 to the Atkinsons in return for a promissory note executed by the Atkinsons in favor of the bank.[123] NBC also advanced

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[114] *Id.* at 596.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 597.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] 530 So. 2d 163 (Miss. 1988).
[122] *Atkinson*, 530 So. 2d at 163.
[123] *Id.* at 164. The note provided that NBC would, at all times, have a security inter-

$1,077.82 to the Atkinsons in order to provide the Atkinsons with the necessary funds to meet their accounts payable. This loan was evidenced by a note which was secured by the Atkinsons' 1979 Chevrolet van.[124]

While the facts presented at trial leave one with a sense of puzzlement as to the underlying purpose, the debts of the Atkinsons had been guaranteed six months earlier through a continuing guarantee agreement between NBC and Scribner Equipment Co., the guarantor.[125] This agreement was effectuated when the Atkinsons defaulted on their notes due to the failure of their business in October of 1982.[126] Some three months later, the Atkinsons sold their van to one H.G. Swanson for $3,200 who in turn received a lien-free title.[127] In handling the transfer of money resulting from the sale, NBC applied $1,143 of the funds to retire the note which had been secured by the van and delivered a check for $1,000 to the Atkinsons. The remaining balance of $1,057 was paid to Scribner Equipment Co.[128] Disgruntled with this payment, the Atkinsons instituted an action against NBC for unlawful conversion of a portion of the proceeds gleaned from the sale of the van.[129] The bank answered, denying the essential allegations of the complaint and asserting a counterclaim for the $20,000 which was at that time unpaid.[130]

After a three year interval,[131] the circuit court dismissed the Atkinsons' complaint with prejudice and held the Atkinsons jointly and severally liable for the principal amount still owed to NBC along with interest and attorney fees.[132] Meanwhile, Scribner Equipment Co. had honored its guaranty agreement with NBC for the debts of the

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est in any funds which it held for the Atkinsons and further, that NBC could, at its option, set off any monies which it held for the Atkinsons against the note or any obligation of the Atkinsons. *Id. See supra* note 4 and accompanying text.

[124] *Atkinson*, 530 So. 2d at 164.

[125] *Id.* The agreement guaranteed payment of the debts of Peter and Norma Atkinson up to a maximum of $20,000. *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* Suit was filed in the Circuit Court of Oktibbeha County. *Id.* The Atkinsons sought $2,057.00 in actual damages and $5,000,000 in punitive damages. *Id.*

[130] *Id.*

[131] *Id.* On July 3, 1986, NBC made a motion for summary judgment asking for a dismissal of the Atkinsons' original claim and for a judgment on its counterclaim for the $20,000 note. *Id.*

[132] *Id.* at 164. The principal still owed to NBC amounted $18,665.46 and the interest which had accrued totaled to $8,818.71. *Id.* Coupled with attorney's fees, the total judgment against the Atkinsons amounted to $31,606.80, plus costs. *Id.*

Atkinsons and had repaid the maximums stated under the agreement.[133] On appeal, the Atkinsons argued that they were entitled to a reduction of the judgment against them for the sums paid by Scribner as well as a recomputation of the interest following this reduction.[134]

The Mississippi Supreme Court answered this claim by stating that the rule in Mississippi concerning payment by a party secondarily liable in discharge of the primary obligor's debts is that "[p]ayment by a guarantor of another's indebtedness does not extinguish the obligation of the debtor to pay according to his agreement."[135] The court found that under this rule, the Atkinsons were still obligated to pay the full indebtedness provided in their contract with NBC.[136] The court further held that Scribner, as guarantor, had a vested right to seek from the Atkinsons all funds paid by Scribner to NBC in discharge of the Atkinsons' indebtedness.[137] The court stated that the payments made to Scribner were in discharge of its own obligation to NBC and not the Atkinsons' obligations.[138] As a result, the court noted, NBC could bring an action against the Atkinsons to enforce the obligations owed to them under the note, and if such a suit were successful and NBC recovered more than required to be made whole, the excess was, as a matter of law, to be held in trust for Scribner.[139]

In a related matter, the court dismissed two defenses the Atkinsons sought to assert as the court found the evidence presented on both to be insufficient to establish a genuine issue of material fact and therefore denied the assignments of error claimed.[140] Finally, in noting

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[133] *Id.* at 164-65. As of January 15, 1986, Scribner had repaid the full $20,000 of which they were obligated under the guaranty agreement. *Id.*

[134] *Id.* at 165.

[135] *Id. See* Stribling Bros. Corp. v. Euclid Memphis Sales, 235 So. 2d 239, 241-42 (Miss. 1970)(obligation of primary obligor is not extinguished upon repayment of indebtedness by guarantor). For a discussion of a related case decided by the Mississippi Supreme Court in 1988, see Comfort Engineering Co., Inc. v. Kinsey, 523 So. 2d 1019 (Miss. 1988). *See supra* note 12.

[136] *Atkinson*, 530 So. 2d at 165.

[137] *Id. See Comfort Engineering Co., Inc.*, 523 So. 2d at 1022 (guarantor has no right of contribution from accommodation endorser). For a discussion on the law of subrogation in Mississippi, see First National Bank of Jackson v. Huff, 441 So. 2d 1317 (Miss. 1983).

[138] *Atkinson*, 530 So. 2d at 165.

[139] *Id.* at 166.

[140] *Id.* The Atkinsons claimed that under another lawsuit filed by them against Scribner in the Circuit Court of Monroe County, the right of Scribner to claim the $20,000 it had paid to NBC was a compulsory counterclaim as defined under MISS. R. CIV. P. 13(a). *Id.* The Atkinsons also contended that the Scribner's guaranty was unsolicited and without their knowledge and therefore constituted a gift. *Id.*

the extreme lack of answers provided by the record in reference to the plethora of legal questions that might be raised, the court dismissed the Atkinsons' claim for conversion contended to have arisen upon NBC's application of the proceeds from the sale of the Atkinsons' van.[141] Again, based upon the lack of showing by the Atkinsons that they were not in default of the loans owing to NBC, the court found that NBC had sufficient rights in the $2,057 that was dispersed upon the sale which eradicated any possible claim of conversion.[142] In closing, Justice Robertson questioned whether the $1,057 paid to Scribner by NBC could possibly be applied to the existing indebtedness and thus reduce the Atkinsons' obligation owed to Scribner, and, further, whether this reduction could also mitigate the amount NBC could seek from the Atkinsons and recover in trust for Scribner.[143] However, these questions were not asserted on appeal and as Justice Robertson noted, were only mentioned as a suggestion that the court was not blind to their presence.[144]

In dissent, Justice Hawkins, joined by Justice Griffin, advanced a meritorious observation that upon payment of the $20,000 by Scribner on the indebtedness owed to NBC by the Atkinsons, Scribner became subrogated to all rights held by the bank on the note.[145] Recognizing this, Justice Hawkins questioned the issue addressed by the majority as being misdirected. This belief was based upon his interpretation of Rule 17(b) of Mississippi Rules of Civil Procedure.[146] The question to be resoled as he saw it was "whether the bank, having been paid in full, should be allowed to proceed to judgment and collect in its own name a note which has been paid by another."[147] He opined that in

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[141] *Id.* at 167.

[142] *Id.* The court noted that as of January, 1983, the Atkinsons were in default on the $20,000 note and that the suggestion offered by Norma Atkinson that an extension would be granted if the interest on the note were brought up to date was moot as nothing was presented to the court to evidence this payment and extension. *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 168.

[146] *Id.* MISS. R. CIV. P. 17(b) provides:

> (b) Subrogation Cases. In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee.

MISS. R. CIV. P. 17 (b).

[147] *Atkinson*, 530 So. 2d at 168.

light of the payment by Scribner to NBC, Scribner should have been required to sue in its own name or in the alternative, been joined as a necessary party. As he found the majority opinion to be a complete anomaly to Rule 17(b), he respectfully dissented.[148]

B. Statute of Limitations on Deficiency Judgments

In *Rankin County Bank v. McKinion*,[149] the Mississippi Supreme Court held that an action seeking a deficiency judgment on a defaulted installment note must be brought within one year of the date of foreclosure.[150] This holding resulted from the court's consideration of the following facts.

Cleo and Martha McKinion executed a note in favor of Rankin County Bank in the principle amount of $70,257.47, on January 8, 1982. The note carried a 17% per annum interest rate and was secured by a deed of trust on a commercial building and .63 acres of land in Rankin County as well as a deed of trust on a commercial lot also in Rankin County.[151] As fate would have it, the McKinions defaulted on the note and foreclosure proceedings were instituted by Rankin County Bank on February 17, 1983.[152] Following the foreclosure sale of the property held as security, a deficiency existed which totaled $27,211.52, plus attorney's fees and interest under the terms of the promissory note. In December of 1985, the bank sold both properties to a third party.[153]

On June 4, 1986, the bank filed its complaint in chancery court[154] seeking a deficiency judgment for the $27,211.52 plus interest and attorney's fees.[155] In defense, the McKinions asserted that the claim was barred by the statute of limitations.[156] The chancellor, upon hearing the arguments presented on the McKinions' motion to dismiss based

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[148] *Id.*

[149] 531 So. 2d 822 (Miss. 1987).

[150] *McKinion*, 531 So. 2d at 826.

[151] *Id.* at 823. The loan advanced to the McKinions was for $68,650.47 plus a title fee of $20.00. Coupled with $1,607.00 of credit life insurance, the amount owed was $70,257.47. *Id.* The note called for quarterly interest payments with a 15% principal plus interest reduction to be paid in July of 1982 and the balance due on or before January 7, 1983. *Id.*

[152] *Id.*

[153] *Id.* The sale of the commercial building plus the .63 acres of land provided $42,500 which was applied against the principal in default.

[154] *Id.* The suit was filed in the Chancery Court of Rankin County on June 4, 1986, some three and a half years after the foreclosure was completed. *Id.*

[155] *Id.*

[156] *Id.*

upon the pleadings, entered an order dismissing the complaint.[157] This order was based upon the chancellor's finding that the statute of limitations had in fact run and thus barred the action for the deficiency.[158]

Rankin County Bank's primary assignment of error was that the chancellor erred in labeling the promissory note as an installment note as described under section 15-1-23 of the Mississippi Code.[159] The bank contended that the note was, in the alternative, a time note which is controlled by section 15-1-49 of the Mississippi Code.[160] The Mississippi Supreme Court found the bank's argument to be misplaced as the emphasis of the statute is placed upon notes which are secured by a mortgage or deed of trust which have been foreclosed.[161] The court found additional support for this interpretation in a previous decision wherein it construed an installment note to mean "a portion of a debt or sum of money which is divided into portions that are made payable at different times."[162] The court found the note involved in the instant case to fall squarely within the form and type of notes contemplated by section 15-1-23 of the Mississippi Code which applies a one year statute of limitation after foreclosure on actions seeking a deficiency judgment on defaulted installment notes.[163] Accordingly, the court affirmed the chancellor on this point, finding the assignment of error to be without merit.[164]

In the alternative, the bank claimed that while the one year statute may apply, "it did not begin to run until after the bank sold the foreclosed property, which it bought at foreclosure, to a third party; otherwise, the argument continued, the bank would not know exactly how much of a deficiency judgment to sue for."[165] The court summarily

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[157] *Id.*

[158] *Id.*

[159] *Id.* Section 15-1-23 of the Mississippi Code provides:

> In all cases, no suit or action shall hereafter be commenced or brought against any installment note, or a series of notes of three or more, whether due or not, where said note or notes are secured by mortgage, deed of trust, or otherwise, upon any property, real or personal, unless the same is commenced or brought within one year from the date of foreclosure or sale of the property pledged as security aforesaid note or notes.

MISS. CODE ANN. § 15-1-23 (1972).

[160] *Id.* Section 15-1-49 of the Mississippi Code states that "[a]ll actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." MISS. CODE ANN. § 15-1-49 (1972).

[161] *McKinion*, 531 So. 2d at 824.

[162] *Id.* (citing Moon & Sons v. Hood, 244 Miss. 564, 572, 144 So. 2d 782, 784 (1962)).

[163] *McKinion*, 531 So. 2d at 825.

[164] *Id.*

[165] *Id.*

rejected this argument, finding that the foreclosure sale, held under the provisions of section 89-1-55 of the Mississippi Code,[166] was of a nature envisioned by section 15-1-23 of the Mississippi Code and that therefore the claim for deficiency was barred by its one year limitation period.[167] Finding no error in the chancellor's decision, the Mississippi Supreme Court affirmed the decree.[168]

Heber S. Simmons, III

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[166] *See* MISS. CODE ANN. § 89-1-55 (Supp. 1987)(power of sale foreclosure).
[167] *McKinion*, 531 So. 2d at 825.
[168] *Id.* at 826.

CRIMINAL LAW

In 1988, the Mississippi Supreme Court handed down decisions involving a defendant's right to a speedy trial,[1] prosecutorial misconduct,[2] evidentiary matters,[3] voir dire/*Batson* challenges,[4] the death penalty,[5] jury instructions,[6] a defendant's right to counsel,[7] sentencing,[8] necessary elements of various crimes,[9] confessions, witnesses,[10] witness immunity,[11] plea bargain agreements,[12] and miscellaneous issues[13] which include the right to a public trial,[14] right to counsel at a voice lineup,[15] and juror note-taking.[16]

I. Speedy Trial

The Mississippi Supreme Court, in *Fisher v. State*,[17] declared that a 790 day interim between indictment and trial was not violative of the defendant's right to a speedy trial.[18] The defendant, Fisher,[19] was ar-

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[1] *See infra* note 17 and accompanying text.
[2] *See infra* notes 45-73 and accompanying text.
[3] *See infra* notes 74-199 and accompanying text.
[4] *See infra* notes 200-237 and accompanying text.
[5] *See infra* notes 238-260 and accompanying text.
[6] *See infra* notes 261-275 and accompanying text.
[7] *See infra* notes 276-295 and accompanying text.
[8] *See infra* notes 296-320 and accompanying text.
[9] *See infra* notes 321-344 and accompanying text.
[10] *See infra* notes 345-363 and accompanying text.
[11] *See infra* notes 364-398 and accompanying text.
[12] *See infra* notes 399-414 and accompanying text.
[13] *See infra* notes 415-416 and accompanying text.
[14] *See infra* note 418 and accompanying text.
[15] *See infra* notes 427-441 and accompanying text.
[16] *See infra* notes 455-464 and accompanying text.
[17] 532 So. 2d 992 (Miss. 1988).
[18] *Fisher*, 532 So. 2d at 996.
[19] *Id.* at 994. Larry R. Fisher was convicted of rape and sentenced to life imprisonment. *Id.* Fisher was snared in a police sting operation. *Id.* In 1983, prior to Fisher's arrest, a series of rapes and at least one murder occurred on a stretch of Highway 80, between Meridian and Russell. *Id.* The assailant stalked his victims, lone women at night, and duped them into pulling over by blinking his headlights. *Id.* The police sting operation which resulted in Fisher's arrest included a police woman and another officer, hidden in the car, driving at night on the affected stretch of Highway 80. *Id.* Fisher stopped the police woman using the same modus operandi, blinking headlights, as had been used in the other attacks. *Id.* Subsequently, the victim in the present case came forward and identified Fisher as her attacker. *Id.*

rested on June 4, 1983, indicted for capital murder and rape on December 1, 1983, and tried for rape on January 30, 1986.[20] Prior to his rape trial, Fisher was convicted of capital murder and sentenced to death.[21] However, Fisher's murder conviction and sentence was subsequently reversed, and on remand he was acquitted.[22] The trial of this case ensued shortly after Fisher's acquittal.[23] Previously, the trial court, on its own motion, continued Fisher's case pending completion of the appeals process stemming from Fisher's murder conviction, or until further motions.[24] The issue presented to the court was whether the defendant's constitutional right to a speedy trial was violated.[25] The court, applying the *Barker* balancing test,[26] reasoned that al-

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[20] *Id.* Fisher was indicted for the capital murder of Melinda Weathers and the rape of the victim in the present case on the same day. *Id.*

[21] *Id.* The murder trial proceeded first. *Id.* The murder victim, Melinda Weathers, disappeared along Highway 80 and was later found dead along the same stretch of Highway 80. *Id.*

[22] *Id.* The Mississippi Supreme Court overturned Fisher's conviction and death sentence. *Id. See* Fisher v. State, 481 So. 2d 203 (Miss. 1985). On remand, venue was changed to Rankin County, and a jury acquitted Fisher of the murder charge. *Fisher*, 532 So. 2d at 994.

[23] *Fisher*, 532 So. 2d at 994. A change of venue was granted and trial proceeded. *Id.* Fisher was acquitted on December 14, 1985, and Fisher's rape trial began on January 30, 1986. *Id.*

[24] *Id.* at 994-95. The order was issued on June 18, 1984 and stated:

ORDER

> The Court on its own motion continues the above described cases due to a trial conviction and sentence of the defendant, Larry Fisher, in cause # 694-C of the crime of capital murder. It is the court's understanding that said cause # 694-C is on appeal and based on the foregoing facts, the Court in an effort of judicial economy, and fairness to both sides, continues the above described cases until further motions or request of either the defendant or the state.
>
> SO ORDERED AND ADJUDGED, this the 18th day of June, 1984.

485 days elapsed between the issuance of this order and the trial of the present case. *Id.* at 995.

[25] *Id.* Fisher argued that his right to a speedy trial, as guaranteed by the United States Constitution, the Mississippi Constitution, and MISS. CODE ANN. § 99-17-1 (Supp. 1987), was violated. *Id.* at 994-95. The sixth amendment of the United States Constitution states that . . . "in all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial . . .". U.S. CONST. amend. VI.

[26] *Fisher*, 532 So. 2d at 995. The court stated that Barker v. Wingo, 407 U.S. 514 (1972), articulated the relevant standard for determining violations of the speedy trial clause. *Fisher*, 532 So. 2d at 995.

> *Barker* enumerates four factors which must be considered: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right to a speedy trial and (4) prejudice resulting to the defendant. No mathematical formula exists according to which the *Barker* weighing and balancing process must be performed. The weight to be given each factor necessarily turns on the

though a delay of 423 days is presumed a violation of the speedy trial clause,[27] the absence of any prejudice to the defendant and the legitimate reasons for delay weighed heavily in favor of the State and disposed of any constitutional challenge.[28] The court explained that the State's decision to delay the expenditure of judicial and prosecutional resources on a defendant facing the death penalty was a legitimate reason for delay.[29] Also weighing heavily in the State's favor was Fisher's admission that the delay was not prejudicial.[30] Furthermore, the court held that the order of continuance, which could have terminated by motion,[31] tolled Mississippi's speedy trial statute.[32] Justice Robertson, the lone dissenter, challenged the majority's ratification of a delay of 970 days between arrest and trial.[33] Justice Robertson argued that, as-

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quality of evidence available on each and, in the absence of evidence, identification of the party with the risk of nonpersuasion. In the end, no one factor is dispositive. The totality of the circumstances must be considered.

Id. (Citing Beavers v. State, 498 So. 2d 788, 790 (Miss. 1986)).

[27] *Fisher*, 532 So. 2d at 995. Citing *Beavers*, the court explained that in the absence of *Barker* factors weighing heavily in favor of the State, a delay of 423 days is presumptively violative of the speedy trial clause. *Id.* Thus, considering the length of delay factor and *Beavers*, the delay of 790 days was violative of the defendant's right to a speedy trial. *Id.*

[28] *Id.* at 996. The court refused to assign little weight to the defendant's assertion of the right factor because the record was unclear as to what the defendant or his counsel knew of the continuance order or when they learned of it. *Id.*

[29] *Id.* at 995. The court stated that generally, the State's refusal to bring a case to trial may not be premised on the fact that the defendant is already in custody for another crime. *Id.* (citations omitted). However, the court explained that where the defendant is under a death sentence, post-indictment delay of trial is justified. *Id.* at 995-96. (citing Jamerson v. Estelle, 666 F.2d 241 (5th Cir. 1982)).

[30] *Id.* at 996. Fisher's brief admitted that the delay was not prejudicial. *Id.* In the final analysis, the court held that the two *Barker* factors, which weighed heavily in the States' favor, overcame the presumptive violation of *Beavers*. *Id.* at 995-96.

[31] *See supra* note 8.

[32] *Fisher*, 532 So. 2d at 996-97. Section 99-17-1 entitled "Indictments to be tried within 270 days of arraignment" states that "Unless good cause be shown, and all continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." MISS. CODE ANN. § 99-17-1 (Supp. 1988). The court, citing Nations v. State, 481 So. 2d 760, 762 (Miss. 1985), explained that the trial judges written order of continuance is equivalent to a judicial determination that good cause existed, and the order tolled the 270 day time limit. *Fisher*, 532 So. 2d at 996-97.

The court reasoned that since the order provided for its own termination by motion, and since the defendant failed to make a motion, the order tolled the speedy trial statute until the prosecution's motion to set the case for trial. *Id.*

[33] *Fisher*, 532 So. 2d at 1000 (Robertson, J., dissenting). Justice Robertson maintained that the defendant's sixth amendment right to a speedy trial was violated. *Id.*

suming the validity of a delay of 544 days is justified where the defendant is under a death sentence, reversal should have been predicated on the unexplained delay of 427 days after the death sentence was reversed.[34]

In *Vickery v. State*,[35] the defendant was tried approximately 1,283 days after her arraignment.[36] The trial court issued eight generic orders of continuance which contributed to the delay.[37] The supreme court opined that where such an order is issued, and the record is silent regarding the reason for delay, the speedy trial statute is not tolled.[38]

In addition, the court held that the delay violated the defendant's sixth amendment right to a speedy trial.[39] Using the *Barker* balancing test,[40] the court reasoned that the unreasonable length of delay[41] coupled with the State's failure to show good cause weighed heavily

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Although Justice Robertson applauded the majority's recitation of the appropriate standard, he chided the majority's application of the *Barker* balancing test. *Id.*

[34] *Id.* at 1001 (Robertson, J., dissenting). Furthermore, Robertson stated that Fisher wrote letters from Parchman demanding a speedy trial. *Id.* In addition, Robertson explained that it was the State's duty to bring the defendant to trial. *Id.* Thus, Robertson reasoned that the assertion of his right to a speedy trial should have been a factor that weighed in Fisher's favor. *Id.* Finally, Robertson argued that common sense dictates the conclusion that enormous prejudice resulted. *Id.* at 1001-02.

[35] 535 So. 2d 1371 (Miss. 1988).

[36] *Vickery*, 535 So. 2d at 1373. Patricia Vickery was convicted for possession of more than one kilogram of marijuana and sentenced to eighteen years. *Id.* Vickery was arrested on January 17, 1983, indicted on February 18, 1983, and ultimately tried on August 28, 1986. *Id.* However, the State was responsible for only 860 days. *Id.* at 1375. The remaining 423 days, attributable to the defendant, tolled the running of the speedy trial statute. *Id.*

[37] *Id.* The orders listed several cases to be continued, and simply stated "For good cause shown the following numbered criminal cases are continued to the next regular term of this court, said causes are numbered on the docket of this court as follows . . ." *Id.*

[38] *Id.* The court rejected the lower court's attempt to circumvent the spirit of the speedy trial statute with generic orders reciting "good cause shown." *Id.* The court further stated that "the state bears the risk of non-persuasion on a good cause issue." *Id.* Therefore, the court concluded that a delay of 870 days without good cause shown violated the defendant's right to a speedy trial under MISS. CODE ANN. § 99-17-1 (Supp. 1981).

[39] *Vickery*, 535 So. 2d at 1376. The court explained that a defendant's constitutional right to a speedy trial, guaranteed by the sixth amendment of the United States Constitution, attaches when the defendant is accused. *Id.* The court further stated that once this right attaches, the *Barker* balancing test is used to determine violations of a defendant's right to a speedy trial. *Id.*

[40] *See supra* note 10.

[41] *Vickery*, 535 So. 2d at 1376-77. The court found the three and one-half year delay prima facie unreasonable. *Id.* at 1377.

against the State.[42] Although the court found that the defendant's failure to assert her right weighed in favor of the State, this lone factor was not determinative.[43] Finally, the court concluded that the resulting prejudice weighed in defendant's favor.[44]

II. Prosecutorial Misconduct

In 1988, the Mississippi Supreme Court was faced with the reviewability of impermissible prosecutional comment on the defendant's failure to testify in the absence of a contemporaneous objection. In *Livingston v. State*,[45] the prosecutor, in a backhanded fashion, violated the general rule which prohibits comment on the defendant's decision not to testify.[46]

During closing arguments, the prosecutor told the jury that according to the jury instructions they were not to take into account the fact that the defendant did not testify.[47] In a five-four decision reversing, the court held the right of an accused not to take the stand is a fundamental right,[48] and [notwithstanding the defendant's failure to

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[42] *Id.* The court reasoned that where the State was responsible for the delay, their failure to show good cause weighed in favor of the defendant. *Id.*

[43] *Id.* The court explained that this factor is never dispositive, but merely a consideration to be weighed against the other factors. *Id.*

[44] *Id.* at 1377-78. The court stated:

> Prejudice is assessed in light of the interest of the defendant which the right to a speedy trial is designed to protect: 1) prevention of oppressive pre-trial incarceration 2) minimization of anxiety and concern of the accused and 3) limitation of the possibility of impairment of defense.

Id. at 1377. The court noted that during Vickery's incarceration she was beaten by other prisoners, tormented by prison guards, and suffered a nervous breakdown. *Id.*

[45] 525 So. 2d 1300, 1305 (Miss. 1988).

[46] *Livingston*, 525 So. 2d at 1305-08. Rickey Livingston was convicted of rape and sentenced as an habitual offender to 40 years imprisonment without possibility of probation or parole. *Id.* at 1302. Livingston's defense was alibi, and he presented four alibi witnesses at his trial. *Id.* However, Livingston did not testify. *Id.*

[47] *Id.* at 1305. At trial, Livingston failed to object to the prosecutor's impermissible comments. *Id.* at 1306.

[48] *Id.* at 1306-08. The court placed great reliance on West v. State, 485 So. 2d 681, 687-88 (Miss. 1985), wherein the court considered a prosecutor's comments on the failure of a defendant to testify despite the absence of a contemporaneous objection. *Livingston*, 525 So. 2d at 1306. The court explained that the review in *West* was premised on the heightened scrutiny given capital cases, and "the fundamental nature of the right asserted." *Id.* Furthermore, the court explained that the decision not to invoke a procedural bar when fundamental rights were involved was carried over into the non-capital arena in Monroe v. State, 515 So. 2d 860 (Miss. 1987) and Griffin v. State, 504 So. 2d 186 (Miss. 1987). *Livingston*, 525 So. 2d at 1306.

In addition, the court stated that the requirement of a contemporaneous objection

make a contemporaneous objection],[49] any prosecutional remarks regarding the exercise of this fundamental right is incurrable, reversible error.[50] However, the dissent argued that the failure to make a contemporaneous objection precludes reversal predicated on the claimed error, "unless the error fatally affected the fundamental fairness of the trial."[51]

In addition, the dissent reasoned that the constitutional violation in the present case was not presumed to be so prejudicial as to require automatic reversal."[52] Thus, in light of what the dissent viewed as overwhelming evidence of guilt,[53] the dissent would have affirmed

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allows a judge the opportunity to cure the error, and opposing counsel opportunity to pursue a different course. *Id.* at 1307. However, the court reasoned that neither action by the judge nor opposing counsel could have cured the error. *Id. See* Folse v. State, 519 So. 2d 1224, 1225 (Miss. 1988)(reversal, predicated on prosecutional comments concerning the defendant's silence, preserved by contemporaneous objection).

[49] *Livingston*, 525 So. 2d at 1306-07. The court, quoting West v. State, 485 So. 2d 681, 687-88 (Miss. 1985), stated that "a defendant has a constitutional right not to take the witness stand." *Livingston*, 525 So. 2d at 1306. *See* U.S. CONST., AMEND. V; MISS. CONST., art. XXVI; MISS. CODE ANN. § 13-1-9 (1972); Griffin v. California, 380 U.S. 609 (1965); and Malloy v. Hogal, 378 U.S. 1 (1964).

In describing the scope of the prohibition on comments regarding the defendant's refusal to testify, the court stated that the prosecutor should not, in a friendly or unfriendly manner, comment directly or by innuendo and insinuation, or bring to the jury's attention by any means, the fact that the defendant did not take the witness stand. *Linvingston*, 525 So. 2d at 1308.

[50] *Livingston*, 525 at 1307-08. The court stated that such impermissible comments entitle a defendant to a mistrial. *Id.* at 1307. The court explained that such comments were incurable, and that even a judge's admonition of the jury could not cure the error. *Id.* (Citing Peterson v. State, 357 So. 2d 113, 115 (Miss. 1978)). Thus, the court refused to procedurally bar review of an incurable violation of one of the defendant's fundamental rights, and accordingly reversed. *Id.* at 1308.

[51] *Id.* at 1309. Justice Dan Lee, joined by Justice Anderson and Justice Griffin, rejected the majority's interpretation of *West* and its progeny. *Id.* at 1309-10. Justice Dan Lee reasoned that these cases merely reinforced the courts obligation in a death penalty case to review the record and "see that the accused received a fair trial." *Id.* at 1309. Furthermore, Justice Dan Lee explained that the same rationale was applicable in a non-capital case where the absence of a contemporaneous objection failed to preserve the claimed error for appeal. *Id.* at 1310. Thus, he concluded that reversal was improper and could not be based on the prosecutor's comments which did deny Livingston of a fundamentally fair trial. *Id.*

[52] *Id.* at 1311. Justice Anderson, joined by Chief Justice Roy Noble Lee, chided the majority's decision to place the fifth amendment infraction in the present case within the class of constitutional violations mandating reversal. *Id.* Justice Anderson argued that not only did no such rule exist, but that the United States Supreme Court has held to the contrary. *Id.*

[53] *Id.* Furthermore, Justice Anderson explained that where the evidence of guilt is overwhelming, errors of this type can be harmless. *Id.*

based on a more general fair trial standard.[54]

However, in *Marks v. State*,[55] the court held that the defendant's failure to make a contemporaneous objection procedurally barred an assignment of error predicated upon blatantly improper argument concerning the degree of the defendant's guilt.[56] In short, the prosecutor asked the jury to convict based upon the potential punishment.[57] Although defense counsel failed to object to the argument, he did make a motion for a mistrial after the jury was excused.[58] The Mississippi Supreme Court stated that "this tactic clearly constitutes a procedural bar."[59] The court explained that defense counsel is under a duty to promptly and contemporaneously object to improper argument, and, if sustained, move for a mistrial.[60] The court, although condemning such argument as "presumptively harmful,"[61] held the error to be procedurally barred and without merit.[62] It appears that the court failed to consider the effect of the prosecution's argument in light of the heinous character of the crime, which improperly prejudiced the defendant in

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[54] *Id.*

[55] 532 So. 2d 976, 983 (Miss. 1988).

[56] *Marks*, 532 So. 2d at 984. Frederick S. Mark was convicted for the murder of his wife and sentenced to life imprisonment. *Id.* at 977. Shortly before Mary Woods Marks was killed, Marks, having just been released from an alcohol detoxification program, visited some local bars and had several alcoholic drinks. *Id.* In addition, Marks purchased a knife and arranged the fatal meeting with his wife. *Id.* At trial, Marks admitted killing his wife, but denied having intended to do so. *Id.* at 978. Marks testified that he arrived at his wife's house while she was out, and upon her return a quarrel ensued in which she took control of his knife. *Id.* According to Marks, she fled and he subsequently overtook her, wrestled the knife from her, and killed her in the heat of passion. *Id.* The autopsy of Mary Woods Marks revealed 19 stab wounds. *Id.*

[57] *Id.* at 983. In closing argument, the prosecutor argued that a manslaughter conviction would not sufficiently penalize the defendant, and that only a murder conviction could impose the proper punishment. *Id.*

[58] *Id.* at 984. Although the trial court found the argument improper, the court reasoned that it did not constitute reversible error and refused to grant a mistrial. *Id.*

[59] *Id.* (Citing Johnson v. State, 477 So. 2d 196, 209-10 (Miss. 1986)).

[60] *Id.* at 984. The court explained that this gives the trial judge the opportunity to assess the objectionable argument, and, if necessary, admonish the jury or order a new trial. *Id.*

[61] *Id.* The court stated that such argument asks the jury to convict based upon the punishment and without regard to the evidence before them. *Id.* at 983. The court described such argument as incompetent and categorically unrelated to the degree of the defendant's guilt. *Id.* at 984. However, the issue confounding the court was whether the improper argument rose to the level of reversible error. *Id.* at 983.

[62] *Id.* at 984. Although the court's decision was based upon the contemporaneous objection rule, the court noted that the defendant admitted killing his wife, and that the killing was accomplished "in a most cruel manner." *Id.*

the jury's eyes, and seriously impinged upon the defendant's right to a fair trial and jury determination based on the evidence.[63]

In 1988, the court outlined the procedure, without deciding the question of admissibility, to profert proof of other acts of deviant sexual misconduct with other children in a child molestation case. In *Hosford v. State*,[64] the court reversed a conviction in a child molestation case based on prosecutorial misconduct and the erroneous admission of inflammatory, irrelevant evidence.[65] The defendant allegedly engaged in cunnilingus with a ten-year-old girl that had spent the night with his step-children.[66] At trial, the prosecution cross-examined the defendant about acts of deviant, sexual conduct with his step-children.[67] The Mississippi Supreme Court held that it was reversible error for the prosecution to initially confront the defendant with allegations of deviant sexual conduct between him and his step-children during cross-examination.[68] The court stated that the State was under a duty to profert any such evidence during the State's case in chief.[69] The court explained that if the evidence was found admissible, the State could have presented what proof it had, and then cross-examined, at length,

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[63] Thus, it appears that the apparently overwhelming weight of evidence supporting a verdict of murder mitigated the harm caused by the improper argument, and, therefore, allowed the court, in good conscience, to procedurally bar the error.

[64] 525 So. 2d 789 (Miss. 1988).

[65] *Hosford*, 525 So. 2d at 789. Bill Hosford was found guilty of sexual battery of felonious sexual penetration of a child under twelve years old. *Id.* See MISS. CODE ANN. §§ 97-3-95 and 97-3-97 (Supp. 1988). Hosford had allegedly engaged in cunnilingus with ten year-old girl. *Hosford*, 525 So. 2d at 789.

[66] *Hosford*, 525 So. 2d at 791-92.

[67] *Id.* During the State's cross-examination of the defendant, the prosecution confronted the defendant with questions concerning his alleged physical abuse and mistreatment of his wife and step-children, as well as with alleged acts of deviant, sexual conduct with his step-children. *Id.* at 791-92. Initially, the court stated that it was procedural error to present substantive evidence of the defendant's guilt during cross-examination or rebuttal. *Id.* at 791. (Citing Rooney v. State, 167 Miss. 827, 150 So. 774 (1933)). Furthermore, the court held that evidence of the defendant's physical abuse of his wife or step-children was "manifestly incompetent at any stage of the trial proceedings." *Id.* at 791-92. The court explained that it was inflammatory and extremely prejudicial, evidence, which had no probative value on the issue before the jury. *Id.* at 791.

[68] *Id.* at 792. The court explained that no showing of necessity was made under the guidelines of Rooney v. State, therefore, the manner in which the State presented its case constituted reversible error. *Id.*

[69] *Id.* The court stated that the competency of such evidence could then be determined, and that profert could have been made out of the presence of the jury so as not to inflame or improperly prejudice the jury. *Id.* However, the court specifically noted that it was not addressing the competency or admissibility of such evidence. *Id.*

the defendant and defense witnesses concerning any such conduct.[70] In addition, the court noted that the error resulting from the State's improper inquiry was compounded by the fact that the State lacked any evidentiary basis for asking such questions.[71] Thus, the court held that where the evidence of guilt is not conclusive, as in this case, the prosecution's unfounded inquiry and assertions constituted reversible error.[72] Although the court seemed to indicate that the presence of conclusive proof of guilt may have been determinative, the court also stated that the mere asking of these questions constituted reversible error.[73]

III. Evidence

A. Rule 609

In 1988, the Mississippi Supreme Court rendered several decisions related to evidence in the field of criminal law.[74] In *McInnis v. State*,[75] the Mississippi Supreme Court outlined the procedure and criteria for determining the "probative value" and admissibility of prior convictions offered to impeach under Rule 609 of the Mississippi Rules of Evidence.[76] The court held that where a prior conviction is offered to

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[70] *Id.*

[71] *Id.* The court conducted a multi-jurisdictional analysis and discussion of the duties and obligations of a prosecuting attorney. *Id.* at 792-94. In short, the court observed that the prosecuting attorney must conduct a criminal prosecution which is fair and assures the defendant of a fair and impartial trial. *Id.* The court reasoned, even if admissible, basic fairness requires an evidentiary basis to ask the defendant questions concerning his guilt in other crimes. *Id.* at 792.

[72] *Id.* at 794. The court relied on State v. Beard, 74 Wash. 2d 335, 444 P.2d 651 (1968), where the defense's failure to object to similar prosecutorial misconduct, coupled with conclusive proof of guilt, resulted in the court affirming the conviction. *Hosford*, 525 So. 2d at 794.

[73] *See supra* note 53.

[74] Cases not treated textually include: Leflore v. State, 535 So. 2d 68, 70 (Miss. 1988) (affirmed circumstantial evidence conviction for business burglary); Whittington v. State, 523 So. 2d 966, 972 (Miss. 1988) (circumstantial evidence murder conviction affirmed); Stokes v. State, 518 So. 2d 1224, 1226 (Miss. 1988) (same).

[75] 527 So. 2d 84 (Miss. 1988).

[76] *McInnis*, 527 So. 2d 88. Rule 609 states:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the

impeach under Rule 609, the prosecution must first make a prima facie showing that the prior conviction has probative value as to the defendant's truthfulness.[77] In addition, the court adopted the "discretionary approach" to advance rulings regarding the admissibility of prior convictions for impeachment purposes.[78]

The court explained that impeachment with prior convictions is admissible under Rule 609 only " 'for the purpose of attacking the credibility of the witness and for no other.'"[79] Therefore, the court reasoned that the prior conviction must be relevant to the witness' propensity for truthfulness.[80] Thus, the court held that the prosecution is required to show that the prior conviction has probative value as to the defendant's propensity for lying.[81] Further, the court stated that ab-

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punishment.

MISS. R. EVID. 609(a).

[77] *McInnis*, 527 So. 2d at 88. Robert H. McInnis was found guilty of robbery and sentenced to eight years imprisonment. *Id.* at 85. During the trial the prosecution was allowed to impeach McInnis with evidence of a prior arson conviction. *Id.* at 85-86. The trial court reasoned that since the prior conviction was a first degree arson conviction, its probative value outweighed its prejudice to the defendant. *Id.* The record revealed no inquiry by the circuit court into the circumstances or nature of the prior arson conviction. *Id.* at 87. The Mississippi Supreme Court reversed, holding that the absence of a prima facie showing probative value resulted in a premature determination of admissibility. *Id.* at 89-90.

[78] *Id.* at 86. On appeal, McInnis argued that the trial court's decision to reserve ruling on his motion in limine effectively precluded defense counsel from conducting a proper defense. *Id.* McInnis' motion in limine asked that the prosecution be precluded from using a prior arson conviction to impeach. *Id.* at 85.

The court explained that the settled procedure in federal court vests discretion in the trial judge. *Id.* at 87. Thus, the court concluded that the decision to reserve ruling was within the trial judges discretionary authority. *Id.*

[79] *Id.* at 88. (Citing United States v. Preston, 68 F.2d 626 (5th Cir. 1986)). The court explained that impeachment with prior convictions is based on the premise that "one who in the past has engaged in a deliberate falsehood of felonious dimension may well be more likely to lie in a subsequent appearance on the witness stand than one not so experienced." *Id.* at 88. Thus, the court reasoned that although a prior criminal act has "no impeachment value in and of itself," the introduction of a prior criminal act to impeach, if of the requisite type, is used to question or lessen the credibility of a witness. *Id.*

[80] *Id.* During trial the prosecution argued that McInnis' prior arson conviction was a "crime of violence", and therefore, admissible to impeach. *Id.* However, the trial court found admissibility properly based on the fact that the conviction was for "first degree arson." The court rejected both theories. *Id.* The only evidence presented was the arson conviction and sentence. *Id.* The record revealed no inquiry into the underlying facts or circumstances which would be probative of the defendant's truthfulness. *Id.*

[81] *Id.* at 89. The court reversed based on the prosecution's failure to make the requisite prima facie showing. *Id.* However, the court prefaced its opinion with the observation that the defendant's credibility was a central issue in the prosecution. *Id.* at 84. The

sent this prima facie showing of probative value, there is nothing to balance against its prejudicial effect in determining admissibility.[82]

Finally, the court stated that if the prosecution meets this threshold burden, the trial judge must then make an on-the-record determination of admissibility using the five factor *Crawford/Peterson* balancing test.[83] The court explained that admissibility stems from the trial judge's application of the five factors and results in the determination that the "probative value of the prior conviction outweighs its prejudicial effect."[84]

In *Johnson v. State*,[85] the Mississippi Supreme Court discussed the relationship and application of parts (a)(2) and (b) of Rule 609. The supreme court affirmed the trial court's decision to preclude the defendant from impeaching two of the State's witnesses with prior convictions admissible under Rule 609(a)(2).[86] The witnesses had identified the defendant as the person fleeing the murder scene.[87] Each witness had prior convictions for the manufacture, possession, and transportation of untaxed liquor.[88] Although defense counsel was per-

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court stated that the arson conviction was not specifically identified as the type of arson probative of the defendant's propensity for lying. *Id.* The court examined the various catagories of arson, all of which the court concluded were not indicative of a person's propensity for lying. *Id.* Finally, the court held that the commission of a crime of violence is not per se probative of a person's propensity for truthfulness. *Id.*

[82] *Id.* at 88.

[83] *Id.* at 87. The factors are:

(1) The impeachment value of the prior crime.

(2) The point in time of the conviction.

(3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue.

Id. United States v. Crawford, 613 F.2d 1045, 1051 (D.C. Cir. 1979); Peterson v. State, 518 So. 2d 632 (Miss. 1987).

[84] *McInnis*, 527 So. 2d at 87. Citing Peterson v. State, the court reiterated the importance of this determination as a prerequisite of the admission of any evidence of prior convictions. *Id.*

[85] 529 So. 2d 577 (Miss. 1988).

[86] *Johnson*, 529 So. 2d at 588.

[87] *Id.* at 585. Leon Johnson was convicted of murder and sentenced to life imprisonment. *Id.* at 578. Johnson's conviction stems from the robbery and brutal murder of a convenience store operator. *Id.* at 579-80. The two witnesses here in question, Tommy Hill and Jack Amison, were at the store when a policeman arrived to investigate. *Id.* at 580-81. The two men heard the shots that wounded the policeman and saw Johnson with the gun. *Id.*

[88] *Id.* at 586-87. Hill had numerous convictions for possession or transportation of untaxed liquor which was excluded. *Id.* Amison had numerous convictions for the manufacture, possession and transportation of untaxed liquor which was also excluded. *Id.*

mitted to impeach the witnesses with recent convictions for the same type crime,[89] the trial judge refused to allow impeachment with prior convictions for the same type crime which occurred more than ten years earlier.[90]

The supreme court agreed that while the prior convictions were admissible under Rule 609(a)(2),[91] their use was precluded by the ten year prohibition of Rule 609(b).[92] In addition, the court reiterated the fact that a defendant is bound by the notice requirements of Rule 609(b).[93] Finally, the court reasoned that even if the defendant had made a balancing argument and given notice,[94] no error could be predicated on the trial judge's decision to exclude the prior convictions where their probative value was diminished by previous impeachment with recent convictions for the same type crime.[95]

However, in *Johnson v. State*,[96] the court simply held that where a prior conviction is offered to impeach under Rule 609(a)(1), the trial judge's determination of admissibility, as well as his reasons, must be made and articulated on the record.[97] During trial, Johnson admitted

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[89] *Id.* at 586. Hill admitted to a conviction for possession of untaxed liquor in 1985. *Id.* Amison stated that he had been convicted in 1985 for the manufacture, possession and transportation of untaxed liquor. *Id.*

[90] *Id.*

[91] *Id.* at 587. The court held that "the manufacture, possession or transportation of untaxed liquor is a crime involving dishonesty or false statement under Rule 609(a)(2)." *Id.* The court reasoned that crimes which defraud federal, state, or city tax collection "stand high in the category of crimes affecting veracity." *Id.* Citing United States v. Gellman, 677 F.2d 65 (11th Cir. 1982)(conviction for failing to file federal tax return admissible under Rule 609(a)(2)); Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981)(same); United States v. Apuzzo, 555 F.2d 306, 307-8 (2d Cir. 1977)(conviction for possession and transportation of untaxed cigarettes admissible under Rule 609(a)(2)), *cert. denied*, 435 U.S. 916 (1978).

[92] *Johnson*, 529 So. 2d at 587. The court stated that "any" prior conviction introduced under rule 609(a) "is subject to the time limits of Rule 609(b)." *Id.* (Citing McCORMICK ON EVIDENCE § 43 (3d ed. 1984)).

[93] *Johnson*, 529 So. 2d at 587. The court explained that a defendant is subject to the notice requirement of Rule 609(b). *Id.*

[94] *Id.* The court noted that the federal courts have construed the time limitations of Rule 609(b) to establish a rebuttable presumption against admissibility of prior convictions more than ten years old. *Id.* The court explained that the presumption against admission of an overage conviction will "very rarely and only in exceptional circumstances" be rebutted. *Id.*

[95] *Id.* at 588.

[96] 525 So. 2d 809 (Miss. 1988).

[97] *Johnson*, 525 So. 2d at 812. In addition, the court stated that this process should take place out of the hearing of the jury. *Id.* The court further explained that admissibility turns on the trial judge's determination of whether the evidence is "more probative of

on cross-examination that he had recently been convicted of the same crime.[98] The trial judge made no determination of admissibility but simply overruled defense counsel's objection and motion for mistrial.[99]

The court stated that the determination of admissibility should include an analysis of the same five factors[100] enumerated in *McInnis*.[101] Although the court made no mention of the *McInnis* requirement,[102] the court explained that "as a rule of thumb" a prior conviction has little impeachment value when it is unrelated to a defendant's veracity.[103] The court proceeded with a discussion of the five factors as

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the defendant's credibility than prejudicial." *Id.* at 811. Quoting the Fifth Circuit, the court stated that "failure to make such a determination robs a defendant of the rule's protection." *Id.* at 812 (Citing United States v. Preston, 608 F.2d 626 (5th Cir. 1979)). Furthermore, the court stated that the "state has the burden of proving the circumstances of the prior conviction in showing why it should be admitted." *Johnson*, 525 So. 2d at 812.

[98] *Johnson*, 525 So. 2d at 811. L. V. Johnson was convicted of forcible rape and sentenced to 40 years without parole. *Id.* at 810. The present prosecution and trial was for Johnson's second rape of the same woman. *Id.* Johnson allegedly raped a 76 year-old woman twice during his burglary of her house. *Id.* The rapes occurred approximately 15 minutes apart. *Id.* Johnson was separately indicted and tried for both rapes. *Id.* His first rape conviction and sentence of life without parole was affirmed in Johnson v. State, 511 So. 2d 1360 (Miss. 1987). *Johnson*, 525 So. 2d at 810-11.

On direct examination Johnson admitted to prior convictions of armed robbery, forgery, and grand larceny. *Id.* at 811. On cross-examination the prosecution questioned Johnson about other felony convictions at which time Johnson disclosed his prior rape conviction in *Johnson* I. *Id.*

[99] *Johnson*, 525 So. 2d at 811. The court explained that a prior rape conviction could be used to impeach under Rule 609 *if* its probative value outweighs its prejudicial effect. *Id.* The court further reasoned that rape was a felony, and the conviction occurred within the last ten years. *Id.*

Thus, the balancing of probative value against prejudicial effect was the determinative factor in deciding whether a prior conviction of the same crime was admissible to impeach. *Id.* In the case sub judice no such balancing or determination was made. *Id.*

[100] *Id.* at 812. *See supra* note 66. *See also* United States v. Mahone, 537 F.2d 922 (7th Cir. 1976)(same five factors); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967)(same).

The court explained that these factors should help guide the trial judge's determination of admissibility when prior convictions are offered to impeach under Rule 609(a)(1). *Johnson*, 525 So. 2d at 812. The court further reasoned that this analytical framework provided a method for articulating the trial judge's determination as well as a medium for ascertaining abuses of discretion on appeal. *Id.*

[101] *See supra* note 58.

[102] *See supra* note 67 and accompanying text. The court noted *McInnis* and other similarly related opinions have been handed down. *Johnson*, 525 So. 2d at 813 n.2.

[103] *Johnson*, 525 So. 2d at 812. In discussing the first factor, the court observed "that convictions which don't relate to credibility, i.e., deceit, fraud, cheating, generally have little probative value for impeachment purposes." *Id.*

they applied in the case sub judice[104] and concluded that the defendant's prior rape conviction was inadmissible.[105]

B. *Rule 404*[106]

In *Edlin v. State*,[107] the supreme court was faced with determining the admissibility of evidence of a defendant's prior bad acts under Rule 404(b) of the Mississippi Rules of Evidence.[108] The defendant, Edlin, was convicted of the murder of his former girlfriend's companion.[109] During trial the prosecution presented evidence of Edlin's breakup with his girlfriend, his pursuit of her after the breakup, and evidence that he rammed her car.[110] The supreme court reversed, holding that evidence of the car-ramming incident was inadmissible under Rule 404(b).[111] The court explained that the "evidential hypothesis"

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[104] *Id.* at 812-13. Under the first consideration the court concluded that a rape conviction has little bearing on a defendant's credibility or veracity. *Id.* at 812. Secondly, the court reasoned that the nearness of a conviction is irrelevant when the conviction "bears little relation to veracity." *Id.* The court found the third consideration extremely prejudicial. *Id.* The court reasoned that where the prior conviction is of the same type crime, there is invariably a predisposition to find guilt by lay jurors based on the assumption that "if he did it before he probably did it this time." *Id.*

Addressing the final two considerations the court found that the admission of the prior rape conviction destroyed the defendant's credibility, a buy factor in the jury's deliberations, which in turn rendered his testimony, the only direct evidence for his defense, "idle ceremony." *Id.* at 812-13.

[105] *Id.* at 813. The court held that the admission of the prior rape conviction deprived Johnson of a fair trail on this rape indictment. *Id.* The court reasoned that the defendant was on trial solely for the rape indictment and not for his criminal record or similar prior convictions. *Id.* Thus, the court concluded that the analytical framework outlined above will help facilitate fair trials for those defendants with criminal records. *Id.*

[106] Houston v. State, 531 So. 2d 598. (Miss. 1988)(pre-rules decision regarding the admissibility of evidence of the defendant's alleged prior acts of child abuse); White v. State, 520 So. 2d 497 (Miss. 1988)(pre-rule decision holding that defendant's prior sexual conduct admissible to show appellant's lustful, lascivious disposition toward his particular victim).

[107] 533 So. 2d 403 (Miss. 1988).

[108] *Edlin*, 533 So. 2d at 404.

[109] *Id.* John Wayne Edlin was convicted of murder and sentenced to life imprisonment. *Id.* at 403. This was a companion case to Edlin v. State, 523 So. 2d 42 (Miss. 1988).

[110] *Edlin*, 533 So. 2d at 404-07. The evidence showed that Edlin and his girlfriend terminated their relationship on November 14, 1984. *Id.* at 404. Further evidence revealed that on the same day Edlin followed his ex-girlfriend and rammed her car with the jeep he was driving. *Id.*

[111] *Id.* The court stated that the decision of whether prior bad acts are admissible is difficult and perplexing. *Id.* at 407-08. The court explained that this decision must be made in accordance with fundamental notions of fairness aided by an analysis of:

behind the car-ramming evidence improperly invited the jury to infer that if Edlin was violent on a previous occasion, he is probably guilty of the violence in the crime charged.[112]

However, the court reasoned that evidence of the breakup was admissible to show motive,[113] and that Edlin's motive, jealously, might be shown in the evidence of his pursuit of his former love.[114] In addition, the court reasoned that the issue of the remoteness regarding these prior deeds was one left to the sound discretion of the trial judge.[115]

Although Justice Anderson agreed with the majority regarding the admissibility of the ramming incident, he argued that it was harmless error.[116] However, Justice Robertson argued that the ramming incident was sufficiently intertwined with the evidence of the breakup, thus, it should have been admissible on the issue of motive.[117]

In *Parks v. State*,[118] the defendant, Parks, was convicted of sexual battery.[119] Parks, posing as a doctor, persuaded his victim, a six year

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each proffer of other crime proof to determine what evidential hypothesis the jury is expected to use, and weighing the probative force of the line of proof against the need of the prosecutor and the risks specified in rule 403. The more reason there is in the decision to admit or exclude, the more apt it is to be fair.

Id. at 407. Citing 2 WEINSTEIN'S EVIDENCE, ¶ 404 [08] (1986).

During trial the State argued that the car ramming was admissible to show motive. *Edlin*, 533 So. 2d at 408. However, during closing argument the prosecution commented on the ramming incident and proclaimed the defendant to be that sort of man. *Id.* Although no objection was made, the court noted that this statement violated Rule 404(b). *Id.*

[112] *Edlin*, 533 So. 2d at 408. The court reasoned that the salient issue "is what was the evidence used to show." *Id.* In other words, the court, quoting WEINSTEIN, asked "what evidential hypothesis was the jury expected to use?" *Id.* In the instant case, the court explained that the evidence of the ramming incidence "was improperly used under rule 404(b) to show that Edlin acted in conformity with his prior alleged bad acts." *Id.*

[113] *Id.*

[114] *Id.* In addition, the court explained that this sort of evidence, in the appropriate circumstances, might also be admissible to show a scheme or plan. *Id.*

[115] *Id.* at 407. The court stated that the issue of remoteness is decided under the analytical framework of Rule 401 and in accordance with the limitations of Rule 403. *Id.* (Citing May v. State, 524 So. 2d 957 (Miss. 1988)).

[116] *Id.* at 412. Justice Anderson reasoned where proof of guilt is so overwhelming such an infraction is harmless. *Id.*

[117] *Id.* Justice Robertson reasoned that they were both either admissible or inadmissible. *Id.* In addition, Justice Robertson argued that the defendant's failure to object to the prosecution's closing argument precluded the supreme court from using the prosecution's closing remarks to determine the admissibility of evidence. *Id.*

[118] 522 So. 2d 755 (Miss. 1988).

[119] *Parks*, 522 So. 2d at 755. George Allen Parks was sentenced to eighteen years in prison. *Id.* The victim testified that Parks placed his finger in her private place. *Id.*

old girl, to remove her clothes for an alleged examination.[120] At trial, another girl testified that a day before the incident in question, Parks presented himself as a doctor to her and asked if he could examine her.[121] Parks argued that this testimony was inadmissible evidence of another crime.[122] The supreme court disagreed, holding that although the defendant's conversation was reprehensible, it neither constituted a crime nor was evidence of another crime.[123] The court further explained that if the conduct did constitute a crime, the girls testimony would be admissible to identify the defendant.[124]

In *Haynes v. State*,[125] evidence of the defendant's rape trial and conviction was admissible to show motive for the assault.[126] The defendant was awaiting trial on other charges at the time of the assault.[127] The assault was an apparent attempt to silence the State's principal witness in the defendant's upcoming trial.[128] The court explained that evidence of the defendant's rape trial and resulting conviction was admissible to show motive under Rule 404(b).[129] In addition, the court stated that no abuse of discretion occurred in the trial judge's determination that the evidence passed Rule 403 muster.[130]

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[120] *Id.* Parks went to the girl's home while her parents were at work. *Id.* Parks presented himself as a physician sent to inquire about the children's immunizations. *Id.* Parks was not a doctor. *Id.*

[121] *Id.* The girl refused. *Id.*

[122] *Id.*

[123] *Id.* at 756. The conduct was not subject to criminal sanctions. *Id.*

[124] *Id.* At trial the testimony of the second girl was necessary to identify the defendant because the victim was unable to identify him as the "doctor". *Id.*

[125] 520 So. 2d 1367 (Miss. 1988).

[126] *Hayes*, 520 So. 2d at 1369.

[127] *Id.* at 1367-68. Robert Andrews Haynes was convicted of aggravated assault and sentenced under the recidivist statute to 20 years imprisonment. *Id.* at 1368. At the time of the assault Haynes was awaiting trial on charges of rape, kidnapping and carrying a concealed weapon. *Id.* at 1368.

[128] *Id.* The victim, Hayne's ex-girlfriend, was also the victim in Haynes' rape-kidnapping trial. *Id.* The assault occurred the day before Haynes was scheduled to be tried on the rape and kidnapping charges. *Id.* The victim was shot in the leg. *Id.*

[129] *Id.* The court explained that evidence of the accused's impending trial was relevant and showed motive for the assault. *Id.* The court reasoned that the defendant's motive was to silence the State's principal witness in an upcoming trial. *Id.*

[130] *Id.* Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is subsequently outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MISS. R. EVID. 403. The court agreed with the trial court's determination that the evidences probative value outweighed the danger of unfair prejudice. *Id.*

In *Wheeler v. State*,[131] the defendant was convicted of aggravated assault on a law enforcement officer.[132] The present indictment resulted from a shooting that left one police officer dead and another wounded.[133] At trial, the trial judge denied defense counsel's motion in limine to preclude any mention of the shooting and/or death of the other officer.[134] The supreme court agreed that admissibility was proper since the crime against the other officer was "integrally intertwined" with the aggravated assault of officer Reid.[135]

In addition, the court stated that Rule 404(b) permits admission of other crimes where they "are so inter-connected [with the instant crime] as to be considered part of the same transaction."[136] The court further explained that Rule 404(b) permits admissibility where the other crime is offered to prove "absence of mistake or accident."[137] Finally, the court explained that the prosecution was entitled to present to the jury "the 'complete story of the crime.' "[138]

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[131] 536 So. 2d 1347 (Miss. 1988).

[132] *Wheeler*, 536 So. 2d at 1348. The police officer, Steve Reid, was wounded when he and three other officers attempted to arrest Noah Wheller pursuant to a request by the welfare department. *Id.* at 1349.

[133] *Id.* The State presented evidence that sometime during the incident Wheeler managed to wrestle officer Reid's pistol from his holster and fire three times. *Id.* When Wheeler was finally subdued, Officer Reid was wounded and Officer Jackie Sherrill was dead. *Id.*

[134] *Id.* at 1352.

[135] *Id.* The court reasoned that the two crimes were "integrally related in time [and] place," and "arose out of a common nucleus of operative facts." *Id.* The court noted "the state's legitimate interest in telling a rational and coherent story of what happened." *Id.* The court stated:

> Proof of another crime is admissible where the offense is charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences. Such proof of another crime is also admissible where it is necessary to identify the defendant, where it is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge.

Id. (Citations omitted). In addition, the court noted that the State alluded to other crimes only when it was reasonably necessary to establish the aggravated assault. *Id.*

[136] *Id.* Citing the comment to Rule 404(b). *Id.*

[137] *Id.* The court noted that the evidence was especially important in the instant case because the defendant's defense was based on accident or mistake. *Id.*

[138] *Id.* The court stated that this evidence explained the absence of Officer Sherrill. *Id.* Finally, the court concluded that the evidence passed Rule 403 muster. *Id.*

IV. SEARCHES AND SEIZURES[139]

In *Carney v. State*,[140] the supreme court held that only evidence obtained within the purview of the lawful portion of the search warrant was admissible.[141] The lawful portion of the search warrant, based on probable cause, authorized a search of the defendant's house for a television and radio.[142] However, the police discovered the contraband which forms the basis of this prosecution while engaged in an unlawful

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[139] *See* Strange v. State, 530 So. 2d 1336 (Miss. 1988)("in the day time" language of a search warrant precluded a search at night).

[140] 525 So. 2d 776 (Miss. 1988).

[141] *Carney*, 525 So. 2d at 785. The court explained that the seizure of other contraband not the purpose or object of the search must be made in accordance with the legitimate scope of the warrant. *Id.* Therefore, the court reasoned that the dispositive issue in determining the legality of the seizure is ascertaining the lawful parameters of the search. *Id.*

[142] *Id.* at 783. Charles Everett Carney was convicted of possession of marijuana with intent to deliver. *Id.* at 778. Pursuant in information from an informant, the police obtained a search warrant to search Carney's residence. *Id.* at 780-81. The search warrant authorized a search for a television, radio, and other small items. *Id.* The police were investigating a burglary at Sears in which a television, radio, and other small items were taken. *Id.* at 780. An apparently reliable informant revealed to the police he had seen a Sear's television and radio at Carney's residence. *Id.* at 781.

The court explained that the sufficiency of a search warrant is determined under the "totality of circumstances" test adopted in Lee v. State, 435 So. 2d 674 (Miss. 1983). *Carney*, 525 So. 2d at 781. The test states:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 782-83. (Citing Illinois v. Gates, 462 U.S. 213 (1983)). Furthermore, the court explained that the objective determination of probable cause requires facts "sufficient to warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.* at 783. (Citing Terry v. Ohio, 392 U.S. 1 (1968)). Finally, the court stated that the prosecution bears the burden of proving probable cause. *Id.*

The court concluded that the observations of a reliable informant provided a substantial basis for the issuance of a search warrant which authorized a search of Carney's residence for a radio and television. *Id.* However, the court held invalid that portion of the search warrant purporting to authorize a search for "other small items." *Id.* at 783.

The court reasoned that the reliable informant provided no facts concerning "other small items" which could be used to form a substantial basis for concluding that probable cause existed. *Id.* at 784. The court further reasoned that the partial invalidity of a search warrant did not mandate in total invalidation. *Id.* Adopting the *Aday* rule, the court explained that the lawful portion of a search warrant may be served and enforced. *Id.* at 784-85. (Citing 2 W. LAFARVE, SEARCH AND SEIZURE § 4.6(f)).

search and after their authority to search had ended.[143]

The court stated that the duration, scope, and intensity of the search was limited by the lawful portions of the search warrant.[144] Therefore, the court concluded that other contraband obtained beyond the lawful authority of the search warrant should be suppressed.[145] However, the court explained that the "plain view doctrine" permits lawful seizure of other contraband discovered within the lawful limits of the search.[146] Thus, the marijuana packages hidden under a spool-table and in an old stove were unlawfully seized.[147] Further, once the authority of the police to search ended, the marijuana discovered in a continuing search was inadmissible.[148]

In *Rooks v. State*,[149] the police, acting pursuant to information gathered by a witness with police training, stopped the defendant's vehicle and asked to search the trunk.[150] One of the defendants, Montee,

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[143] *Id.* at 784-85. When the police arrived at Carney's residence to execute the search warrant they discovered the radio on the patio. *Id.* at 781. The police subsequently found two envelopes of marijuana secreted under a wooden spool on the patio, and 20 envelopes of marijuana hidden in an old stove in the yard. *Id.* Then the police entered the house and discovered the television and another envelope of marijuana on a bar. *Id.* The police continued their search and uncovered more marijuana. *Id.* at 782.

[144] *Id.* at 785. The lawful portion of the search warrant permitted a search for a television and radio. *Id.* at 783. The court indicated that the meticulous manner in which a search proceeds must be reasonably calculated to lead to the discovery of a television or radio. *Id.* at 785. In addition, the court explained that the authority to search ends once the named items are discovered. *Id.*

[145] *Id.* Therefore, the court reasoned any contraband seized under the unlawful portion of the search warrant was inadmissible, and any contraband obtained in a search incongruent with the legitimate scope of the lawful portion was inadmissible. *Id.*

[146] *Id.* at 785-86. The court held that there must be a warrant limited in scope, and the seized contraband must have been perceived or brought into plain view during a lawful search. *Id.* at 786. However, the court cautioned that evidence in plain view does not justify a warrantless search. *Id.* (Citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

[147] *Id.* at 787. Thus, only evidence obtained in a search for a radio and television was admissible. *Id.* The police admitted that they were not searching for a television or radio when they discovered marijuana under the wooden spool and in the stove. *Id.*

[148] *Id.* The seizure of the marijuana in the attic was held unlawful because the television and radio had already been located. *Id.*

[149] 529 So. 2d 546 (Miss. 1988).

[150] *Rooks*, 529 So. 2d at 548-49. The defendants, Ronald J. Rooks and Greg L. Montee, were convicted for possession of marijuana and sentenced to twenty years imprisonment. *Id.* at 548. The witness observed the defendants drive to a location at the Indianola airport not normally travelled by vehicles. *Id.* He watched one of the defendant's retrieved two garbage bags from the nearby grass and placed them in the trunk of the car. *Id.* The witness had two years of criminal justice education, and had witnessed drug "pickups" and arrests. *Id.* After the car left the airport, the witness contacted the

refused, explaining that this was a rental car, and that in any event the police officer had no search warrant.[151] The defendants were arrested, and a search of the car disclosed two garbage bags of marijuana.[152] A trace of the rental car[153] and a search of the defendants[154] lead police to a black Chevrolet truck at a Holiday Inn in Greenwood.[155] A local police officer was dispatched to watch the truck while a search warrant was obtained.[156] A search of the truck uncovered over three-hundred pounds of marijuana and other articles associated with smuggling.[157] The trial judge suppressed the marijuana found in the trunk of the car, but admitted the marijuana seized from the truck.[158]

The defendants contended that the search of the truck was invalid since it was based on evidence obtained in an unlawful search of the automobile.[159] The supreme court rejected the defendants contention that search of the automobile was unlawful.[160] Although the evidence was suppressed, the court stated that the police officers had probable cause to stop and search the automobile.[161] The court explained that a

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police and informed them of the events that had transpired and of the car's license plate number. *Id.* Thereafter a police officer stopped the defendant's car. *Id.*

[151] *Id.* The automobile was rented from Mims Rental Agency. *Id.* at 549. Montee stated that he did not have the key to the trunk. *Id.* Then, Rooks stepped out of the car, dropped the key, and then stepped on it as if he was extinguishing a cigarette. *Id.* at 548.

[152] *Id.* at 548-49. The arresting officer smelled marijuana and communicated this fact to the sheriff. *Id.* at 549. The sheriff obtained a search warrant which lead to the search and seizure of the marijuana in the trunk. *Id.*

[153] *Id.* The Mississippi Bureau of Narcotics (hereinafter Bureau) was monitoring the police conversations relating to the airport incident and arrest of the defendants. *Id.* The bureau dispatched an agent to investigate. *Id.* Both the agent and the dispatcher for the highway patrol talked with the Mims Rengal Agency (hereinafter Mims) and learned that the defendants were registered at a Greenwood Holiday Inn. *Id.*

[154] *Id.* Two keys for a Holiday Inn in Greenwood were discovered on the defendants. *Id.*

[155] *Id.* Mims told police officials that she saw Rooks motion to a black chevrolet pickup as he left the rental agency. *Id.*

[156] *Id.*

[157] *Id.* The police discovered a listing of police frequencies nationwide, radio scanner, various sorts of radios, batteries, and other items. *Id.*

[158] *Id.* at 550.

[159] *Id.* at 550-51. The defendants argued that the search of the car was not based on probable cause. *Id.* Therefore, the "fruit of the poisonous tree' error was committed." *Id.* at 551.

[160] *Id.* at 555. The court reasoned that the events that transpired at the airport provided "a classic case of probable cause that these men were carrying contraband." *Id.* Furthermore, the court held that the events were observed and relayed to the police by a reliable person. *Id.*

[161] *Id.*

warrantless search of an automobile is permitted where there exists probable cause of sufficient strength which would authorize a magistrate to lawfully issue a search warrant.[162] As to the existence of probable cause, the court stated:

> It is incumbent upon all judges of this state to scrupulously examine the facts in each case, make a careful evaluation, and in their own best judgment gleaned from life's experiences determine whether probable cause existed for a particular search or issuance of a magistrate's search warrant. . . . it must be information reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found.[163]

Finally, the court reasoned that even absent the information gleaned from the automobile, there existed independent probable cause to search the Chevrolet truck.[164]

V. Discovery[165]

In *Darghty v. State*,[166] the trial court refused to allow the testimony of a defense witness because the defendant failed to comply which Rule 4.06 of the Uniform Criminal Rules of Circuit Court Prac-

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[162] *Id.* at 554. (Citing U.S. v. Ross, 456 U.S. 798 (1982); Wolf v. State, 260 So. 2d 425 (Miss. 1972); and Pass v. State, 193 So. 2d 119 (Miss. 1966)).

[163] *Id.* at 554-55. The court stated that the validity of a search and seizure must be examined in accordance with the fourth amendment of the United States Constitution and article III, section 23 of the Mississippi Constitution. *Id.* at 551. However, the court explained that although they were bound by federal precedent regarding the fourth amendment, the court had reserved the prerogative to interpret section 23 differently. *Id.* Nevertheless, the court stated that they had adhered to the "same procedure" adopted by the United States Supreme Court. *Id.* at 554. *See* Illinois v. Gates, 462 U.S. 213 (1983)(adopting totality of circumstances test to determine probable cause).

The court also noted that in addition to the articulated standard, the *Aguiler* and *Spinelli* tests would remain guides to assist in the magistrate's determination of probable cause. *Rooks*, 529 So. 2d at 555. *See* Spinelli v. U.S., 393 U.S. 410 (1969)(two-prong test to determine probable cause); Aguilar v. Texas, 378 U.S. 108 (1964)(Same).

[164] *Rooks*, 529 So. 2d at 555. The court stated that the police separately discovered the involvement of a pick-up truck. *Id.* The court explained that the existence and location of the truck was also obtained from conversations with Mims, the operators of the Holiday Inn, and the Missouri vehicle registration number. *Id.*

[165] *See* Moore v. State, 536 So. 2d 909, 911 (Miss. 1988)(when prosecution volunteers discovery in absence of written request, other discovery may not be withheld which otherwise would be disclosed).

[166] 530 So. 2d 27 (Miss. 1988).

tice.[167] At trial, the prosecution presented the defendant's written confessions.[168] However, the defendant argued that he signed the confessions because his wife represented to him that she would have the charges drastically reduced when he signed over to her title to their truck.[169] The confessions were admitted, and during the defendant's

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[167] *Darghty*, 530 So. 2d at 30. Rule 4.06 states in part:

> (a) The prosecution shall disclose to each defendant or to his attorney, and permit him to inspect, copy, test, and photograph upon request and without further order the following:
>
> (1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial;
>
> * * * * *
>
> (c) If the defendant requests discovery under this Rule, the defendant shall, subject to constitution limitations, disclose to the prosecutor and permit him to inspect, copy, test and photograph the following information and material which corresponds to that the defendant sought and which is in the possession or control of the defendant or his counsel;
>
> (1) names and addresses of all witnesses in chief proposed to be offered by the defendant at trial;
>
> * * * * *
>
> Defense counsel shall make the foregoing disclosures simultaneously with the corresponding disclosure from the prosecutor.
>
> * * * * *
>
> (j) If at any time the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
>
> Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Id. at 31-32; UNIF. CRIM. R. CIR. CT. PRAC. 4.06.

The defendant, Edward Lee Darghty, was charged with three counts of having felonious carnal knowledge with his step-daughter. *Darghty*, 530 So. 2d at 28. Darghty signed a written confession. *Id.*

[168] *Id.* at 29. The confession was signed in the presence of two law enforcement officials. *Id.* The police treated Darghty courteously and gave him all *Miranda* warnings prior to taking his statement. *Id.* at 31.

[169] *Id.* at 29. Darghty made no assertions that the confession was not free and voluntary. *Id.* Darghty claimed that the confession was given as a result of his wife's promises. *Id.* Specifically, Darghty explained that in return for him signing title to a truck over to his wife, which he did, she was to get the charges reduced. *Id.* This conversation allegedly occurred in the jail and in the presence of other prisoners. *Id.* Furthermore, the defendant stated that because of his bad heart condition he was willing to sign a confession to lesser charges in order to avoid the risk of a potentially stiffer sentence. *Id.* The charges were not reduced, and no evidence was presented that the defendant's wife and police conspired to trick the defendant into signing the confession. *Id.*

case-in-chief defense counsel called as a witness one of the prisoners in the room during the alleged conversation between the defendant and his wife.[170] The witness' name was not identified to the prosecution in discovery under Rule 4.06.[171] The trial court found that the defendant's failure to comply with Rule 4.06 precluded the witness' testimony.[172] The defendant was eventually convicted on three indictments for having felonious carnal knowledge with his step-daughter.[173]

Initially, the supreme court held that the confession was not rendered inadmissible by the alleged conduct of the defendant's wife.[174] Further, the court stated that the relevancy of the alleged promise went to the credibility and weight to be accorded the confession.[175] Therefore, the court reasoned that the testimony of the excluded witness was relevant to corroborate the defendant's testimony regarding his wife's alleged promise.[176] The supreme court reversed, holding that where a defendant violates Rule 4.06, the court must follow the same procedure applicable when the prosecution violates the rule.[177] The

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[170] *Id.* at 30. The witness, Willie Lee Loveberry, was one of the prisoners present during the alleged conversation. *Id.*

[171] *Id.* Loveberry's name was not furnished to the prosecution as a witness. *Id.* The State objected. *Id.*

[172] *Id.* The lower court reasoned that Rule 4.06 was a self-executing rule, and that fairness precluded the defendant from calling unknown witnesses. *Id.*

[173] *Id.* at 28.

[174] *Id.* at 31. The court reasoned that although the conduct might render a confession inadmissible if engaged in by police officials, the party was not connected with the police investigation and therefore did not invalidate the confession. *Id.* (Citing Colorado v. Connelly, 107 S.Ct. 515 (1986); Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987); Lockett v. State, 517 So. 2d 1317 (Miss. 1987)).

[175] *Id.*

[176] *Id.*

[177] *Id.* at 32-33. The court explained that a discovery violation "does not automatically justify exclusion of the evidence." *Id.* at 32. The trial court stated:

> When faced with a discovery violation, technical or otherwise, the trial court should follow this procedure:
>
> (1) Upon defense objection, the trial court should give the defendant a reasonable opportunity to become familiar with the undisclosed evidence by interviewing the witness, inspecting the physical evidence, etc.
>
> (2) If, after this opportunity for familiarization, the defendant believes he may be prejudiced by lack of opportunity to prepare to meet the evidence, he must request a continuance. Failure to do so constitutes a waiver of the issue.
>
> (3) If the defendant does request a continuance the State may choose to proceed with trial and forego using the undisclosed evidence. If the State is not willing to proceed without the evidence, the trial court must grant the requested continuance.

Id. at 23. (Citing Cole v. State, 525 So. 2d 365, 367-68 (Miss. 1987)).

court reasoned that "even-handed application of the rule requires the same procedure to be followed" regardless of whether the prosecution or defense violates the rule.[178]

VI. HEARSAY[179]

In *Reed v. State*,[180] the supreme court held that a defendant's prior deposition in a civil suit involving the same transaction was admissible hearsay despite the defendant's decision not to testify.[181] Bill Wood Chevrolet brought a civil suit against the defendant to recover actual damages for the alleged failure to pay for two vehicles.[182] The defendant was deposed and admitted that he had not paid the debt.[183] The defendant was not represented by counsel, and no criminal charges were pending.[184] Shortly after a default judgment was entered, the defendant was indicted and convicted for embezzlement.[185] At trial, the lower court permitted the prosecution to read the defendant's deposition into evidence.[186]

The court held that the deposition was admissible as a hearsay exception under Rule 804 (a)(3) of the Mississippi Rules of Evidence,

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[178] *Darghty*, 530 So. 2d at 33. The court stated that the violation does not permit the lower court to simply exclude evidence. *Id.*

[179] *See* Jackson v. State, 527 So. 2d 654 (Miss. 1988)(hand written note of murder victim held admissible); Kniep v. State, 525 So. 2d 385 (Miss. 1988)(reversal of conviction for failure to admit the remainder of an autopsy report under Rule 106); Gullett v. State, 523 So. 2d 296 (Miss. 1988)(hearsay statements inadmissible and unavailable declarant's statements against penal interest are not sufficiently trustworthy to warrant exception to hearsay rule); Watson v. State, 521 So. 2d 1290 (Miss. 1988)(complaint letters to credit card company admissible in criminal conspiracy case under Rule 803(6)).

[180] 523 So. 2d 62 (Miss. 1988).

[181] *Reed*, 523 So. 2d at 66-67.

[182] *Id.* at 64. Harold Reed was a wholesaler in the car business. *Id.* at 63. Reed's van was disabled while on a trip to Arkansas. *Id.* Reed was forced to purchase a vehicle from Bill Wood Chevrolet. *Id.* Subsequently, Reed and Wood entered into an agreement in which Reed was to take possession of 13 vehicles and attempt to sell them in Olive Branch. *Id.* at 64. Two of the thirteen cars were not paid for nor returned. *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 66. The prosecution called Wood to testify about the transaction. *Id.* On cross-examination, Wood stated that he had filed a civil action concerning the subject matter of the present prosecution. *Id.* Then, on redirect and over defense counsel's objection, Reed's deposition was introduced into evidence. *Id.* Counsel for Reed argued that the deposition was only admissible to impeach should the defendant elect to testify. *Id.* The lower court stated "that the defendant had opened up the subject of the civil suit in cross-examination." *Id.*

"because the statements therein 'so far tended to subject the declarant to civil . . . liability . . ., that a reasonable man in his position would not have made the statements unless he believed them to be true.' "[187] And, despite the defendant's decision not to testify, the court rejected the defendant's assertion that his answers in the deposition did not waive his right against self-incrimination.[188] Finally, the court explained that a civil defendant implicated in a criminal investigation can avoid this problem by obtaining a protective order under Rule 30(b) of the Mississippi Rules of Civil Procedure to postpone civil discovery until final disposition of the criminal proceedings.[189]

Ponthieux v. State[190] involved the admissibility of statements, seemingly hearsay, made in the course of a killing for hire.[191] The defendant, Elster J. Ponthieux, allegedly hired John B. Nixon, Sr. to kill Ponthieux's ex-wife.[192] The murder was carried out by Nixon, Sr., his son, Henry Leon Nixon, and his son's associate, Gilbert Jimenez.[193]

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[187] *Id.* On appeal, the defendant argued that the admission of the deposition "violated his right against self-incrimination" and "constituted a comment on his refusal to testify." *Id.* The court explained that the use of depositions in criminal prosecutions is "controlled by the Mississippi Rules of Evidence and any relevant federal or state constitutional provisions." *Id.* The fifth amendment of the United States Constitution states "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* at 65. Similarly, the Mississippi Constitution provides that "the accused shall not be compelled to give evidence against himself." *Id.*

[188] *Id.* at 67. The court stated that the defendant's conduct can act as a wavier of his right against self-incrimination. *Id.* The court discussed numerous cases where a defendant's confession and former testimony in a criminal trial was admitted. *Id.* In addition, the court stated that the testimony of "a criminal defendant in a previous civil proceeding has generally been freely admitted against him in a subsequent prosecution . . ." *Id.*

However, the court stated that waiver must be determined on a factual basis. *Id.* The court noted that the defendant was apparently unaware of the fact that he was under criminal investigation at the time of the deposition. *Id.* Nevertheless, the court held that a waiver did occur. *Id.* (Citing MISS. R. EVID. 804(b)(3)).

[189] *Id.* at 67-68. In addition, the court rejected the defendant's assertion that the introduction of the deposition impermissibly constituted comment on the defendants failure to testify. *Id.* at 68.

[190] 532 So. 2d 1239 (Miss. 1988).

[191] *Ponthieux*, 532 So. 2d at 1241. Elster J. Ponthieux was convicted of capital murder and sentenced to life imprisonment. *Id.* "Ponthieux was tried as a principal on the theory that he was an accessory before the fact." *Id.* Ponthieux and the victim, Virginia Ponthieux Tucker, were divorced in 1984. *Id.* Virginia subsequently married Thomas Tucker. *Id.* Virginia was shot and killed at the Tucker home. *Id.*

[192] *Id.* John B. Nixon, Sr., and his son, John B. Nixon, Jr., operated a garage in Utica near the residence of Ponthieux. *Id.* at 1241-42. Nixon, Sr., had another son, Henry Leon Nixon. *Id.* at 1242. Henry Leon and a friend Gilbert Jimeney, were visiting Nixon, Sr., at the time of the murder. *Id.*

[193] *Id.* On the morning of the murder, Nixon, Sr., Henry Leon and Jimeney made

During trial Henry Leon testified to "statements made by . . . Nixon, Sr., and by Ponthieux through Nixon, Sr."[194] On appeal, Ponthieux argued that the testimony was inadmissible hearsay.[195]

The supreme court held that the testimony concerning the statements was properly admitted as non-hearsay under Rule 801(d)(2)(E).[196] The court found that substantial evidence supported the trial court's conclusion that the prosecution established the existence of a conspiracy.[197] Further, the court explained that "the prosecution was entitled to offer evidence of the plan and motive, and . . . to employ the rule 104 procedure to establish rule 801(d)(2)(E) admissibility by showing that a conspiracy preceded consummation of the principal offense."[198] Thus, the court concluded that each statement

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their way into the Tucker home and shot Virginia at "point blank range." *Id.* Thomas Tucker testified that he told Nixon, Sr., that he knew Ponthieux sent him to kill them and that they had money. *Id.* Nixon, Sr., allegedly replied "the deal's already been made." *Id.* Henry Leon's testimony was consistent with Tucker's testimony. *Id.* Jimenez testified that Nixon, Sr., said "the deal done went down." *Id.*

[194] *Id.* at 1243.

[195] *Id.* Ponthieux argued that it was Rule 801 hearsay and inadmissible under Rule 802. *Id.* However, the prosecution argued that the testimony was admissible under the co-conspirators exception to the hearsay rule. *Id.* The trial court ruled that the testimony was admissible under the co-conspirator's exception if the prosecution established the existence of a conspiracy between Ponthieux and the Nixon's to kill Virginia Tucker. *Id.* Thereafter, John Jr., testified that shortly before the murder he went to Ponthieux's residence to pick up some money. *Id.* John, Jr., stated that he received $2,300.00, and that Ponthieux told him that had already paid a lot of money and the job wasn't done yet, and that if anything happened to his son during the job he would kill the Nixons. *Id.*

[196] *Id.* at 1244. The court explained that "once a conspiracy is established, a statement made by a co-conspirator of a party during the course and in the furtherance of the conspiracy is admissible against each conspirator, notwithstanding the confrontation clause or hearsay rule." *Id.* (Citing Bourjaily v. United States, 107 S.Ct. 2775 (1987); MISS. R. EVID. 801(d)(2)(E)).

[197] *Id.* The court rejected the defendant's contention that the co-conspirator exception was applicable only in conspiracy cases. *Id.* The court stated that the basis of the court's determination of whether the prosecution established the existence of a conspiracy was limited to evidence presented at the Rule 104 predicate hearing. *Id.* The court explained that as a reviewing court the court will search the entire record and "employ a clearly erroneous standard of review." *Id.*

[198] *Id.* Rule 104 states:

> (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon,

fell within the parameters of Rule 801(d)(2)(E) since each statement was "by a co-conspirator of a party offered against a party" . . . and "was made in the course of an in furtherance of that conspiracy."[199]

VII. Voir Dire

A. Batson *Challenges*

In 1988, the Mississippi Supreme Court rendered decisions in a number of cases involving challenges to jury composition[200] most of which were brought under *Batson v. Kentucky*.[201] In *Batson*, the

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or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If offeror fails to meet the condition, the objector may request the jury be instructed to disregard the evidence, however, such request shall not be a prerequisite to motion for mistrial. For purposes of punitive damages, proof of net worth shall not be offered until the close of evidence and the court has determined that issue will be submitted the jury.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases by conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interest of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Id.

[199] *Id.* at 1244. The court reasoned that each statement was "by a co-conspirator, Nixon, of a party , Ponthieux, offered against [a party] Ponthieux." *Id.*

[200] Lanier v. State, 533 So. 2d 473, 477 (Miss. 1988) (no proof that under-representation of blacks on jury venire arrived at in discriminatory fashion); Goggins v. State, 529 So. 2d 649, 651 (Miss. 1988) (where defendant was black, defense attorney's use of peremptory challenge to strike all whites does not justify State using its peremptory to strike all blacks); Chisholm v. State, 529 So. 2d 635, 637 (Miss. 1988) (acceptance of other black persons as jurors is no defense to *Batson* claim); Baskins v. State, 528 So. 2d 1120, 1121 (Miss. 1988) (defendant's refusal to accept jury allows later *Batson* challenge to composition); Taylor v. State, 524 So. 2d, 565, 566 (Miss. 1988)(State's use of peremptory challenges to strike all but one black did not violate *Batson*); Abram v. State, 523 So. 2d 1018, 1019 (Miss. 1988) (remanded for *Batson* type hearing on State's use of peremptory challenges which resulted in all-white jury for black defendant); Britt v. State, 520 So. 2d 1377, 1379 (Miss. 1988) (no *Batson* application where defendant charged that prosecutor systematically eliminated men from jury); Dedeaux v. State, 519 So. 2d 886, 888 (Miss. 1988) (remand for *Batson* type hearing where lower court declined to make State articulate reasons for discriminatory use of peremptory challenges); Jackson v. State, 518 So. 2d 1219, 1219 (Miss. 1988) (same).

[201] 476 U.S. 79 (1986). The Court held that "the state's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Id.* at 89. In keeping with this principle, prosecutors may not challenge

United States Supreme Court held that a prima facie case of impermissible discriminatory use of peremptory challenges is established against the State when a criminal defendant shows (1) that he is a member of cognizable racial group; (2) that the prosecution has used peremptory challenges to strike veniremen of the defendant's race, and; (3) that these facts and other relevant circumstances infer that the prosecution used its peremptory challenges to exclude the veniremen on account of their race.[202] Once the defendant makes a prima facie showing of purposeful discrimination in the prosecutor's use of peremptory challenges, the burden is on the State to come forward with racially neutral explanations for the challenges.[203]

The large majority of 1988 cases involving *Batson* challenges were decided by applying the *Batson* standard to the factual situation in which a black defendant alleged a prosecutor had used his peremptory challenges to keep blacks off of the trial jury. However, the Mississippi Supreme Court did address the application of *Batson* in two other factual situations left unanswered by the United States Supreme Court in its original holding.[204]

In *Britt v. State*,[205] the Mississippi Supreme Court held that *Batson* did not apply to gender based discrimination in the jury selection process.[206] The male defendant in *Britt* was convicted of aggravated assault and argued on appeal that he was denied a fair and impartial

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potential jurors solely on the basis of race. The test enunciated in *Batson* for determining when a prosecutor has impermissibly excluded members of the venire through the discriminatory use of peremptory challenges was adopted by the Mississippi Supreme Court in Williams v. State, 507 So. 2d 50 (Miss. 1987). *See generally 1987 Mississippi Supreme Court Review*, 57 MISS. L.J. 427, 498-505 (1987) (complete discussion of *Batson* and its application to Mississippi).

[202] *Batson*, 476 U.S. at 96-97.

[203] *Id.* at 97. The reasons must be related to the case being tried and cannot include an assumption that jurors would be partial to the defendant because of their shared race. *Id.* at 97-98.

[204] The application of *Batson* to groups other than racial minorities was a question left open by the Supreme Court. Although the Court held that *Batson* applied to racial minorities alleging discrimination, it did not foreclose the possibility that other groups might bring similar actions based on some shared trait or immutable characteristic. Consequently, some jurisdictions have begun to expand *Batson* in different ways. *See, e.g.*, Edmonson v. Leesville Concrete Co., 860 F.2d 1308, 1312 (5th Cir. 1988) (peremptory challenges to jurors in private, civil litigation is state action for equal protection purposes); United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (Italian-Americans may be cognizable group under *Batson*). *But see* United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987) (young adults do constitute cognizable group under *Batson*).

[205] 520 So. 2d 1377 (Miss. 1988).

[206] *Britt*, 520 So. 2d at 1379.

trial.[207] Britt alleged the prosecution had used its peremptory challenges to systematically exclude men during the jury selection process, thus denying him a fair cross-section of the community on the jury.[208]

In affirming the lower court's denial of a defense motion to empanel a new jury, the Mississippi Supreme Court reasoned that a *Batson* question was not presented in this case.[209] The court acknowledged the defendant's right to a jury selected by non-discriminatory criteria, but relied on *Batson* in noting that the sixth amendment has never been held to require that petit juries must mirror the community.[210] The court indicated that it had found no authority which would bring Britt's claim within the scope of *Batson*.[211]

In another *Batson* case, *Goggins v. State*,[212] the black defendant convicted of armed robbery alleged that the State had improperly used two of its peremptory challenges to systematically exclude blacks from the jury.[213] At trial, during selection of the jury, the defense attorney admitted that he used all of his peremptory challenges to strike whites because they were white.[214]

In response, the prosecutor indicated that he was going to exercise his challenges in a similar fashion, and subsequently struck two black jurors on account of race.[215] The Mississippi Supreme Court reversed and remanded for a new trial, holding that the prosecutor's candid admission that black jurors were excluded on the basis of race showed

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[207] *Id.*

[208] *Id.* However, on appeal, the record did not indicate the names and gender composition of either the jurors ultimately seated or the persons peremptorily challenged off the venire panel. *Id.* at 1379. The lower court, in denying defendant's motion to impanel a new jury, acknowledged that there was a "preponderance" of females on the jury, but found no indication that the jury was "improperly selected or improperly chosen other than by random selection." *Id.*

[209] *Id.*

[210] *Id. See also* Taylor v. Louisiana, 419 U.S. 522, 522 (1975) (no requirement for petit jury to mirror the community).

[211] *Id.* at 1379.

[212] 529 So. 2d 649 (Miss. 1988).

[213] *Id.* at 650.

[214] *Id.* at 651.

[215] *Id.* The final composition of the jury was eleven whites and one black. *Id.* When the State struck the two black jurors, the trial judge required the prosecutor to articulate his reasons for doing so. *Id.* The prosecutor explained that neither of the jurors would look at him directly; one had not fully completed the jury form (she did not fill in the names of her mother and father and how far she lived from the courthouse), and the other "showed an indifferent attitude." *Id.* In explaining his decision, the district attorney said he had relied on information supplied to him during a CLE course that young black men and women as a group would be more favorable toward a defendant. *Id.*

unequivocally an improper use of peremptory challenges.[216]

Although not discussed in *Goggins*, the defense attorney's decision to strike the first twelve jurors because they were white[217] may indicate that the Mississippi Supreme Court does not intend to extend the *Batson* test to either defendants or non-racial minorities.

Other cases involving challenges to jury composition were remanded for *Batson* hearings because the State failed to give reasons for the strikes.[218] In two cases, the court declined to remand because the *Batson* test had been met.[219] In both cases, the defendant had not attempted to rebut the prosecutor's explanations when offered the chance.[220]

B. General Challenges

The Mississippi Supreme Court further addressed the issue of the voir dire process in *Harris v. State*[221] and *Brown v. State*.[222] In *Harris*, at the defendant's trial for murder,[223] the attorney for the defense,

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[216] *Id.* at 652. *See also* Thomas v. State, 517 So. 2d 1285, 1286 (Miss. 1987) (applying *Batson* standard to Mississippi cases where prosecutor improperly uses peremptory challenges).

[217] *Id.* at 651. Dissenting from the majority, Justice Hawkins believed a neutral explanation sufficient to meet the *Batson* test had been proffered in the case of one of the jurors, and that if the district attorney had based his challenge on an actual study or statistics, then that challenge was proper also. *Id.* at 654-55 (Hawkins, J., dissenting).

[218] *See* Baskins v. State, 528 So. 2d 1120, 1122 (Miss. 1988) (remanded for *Batson* hearing to give State opportunity to enumerate neutral, non-racial explanations for use of peremptory challenges which defendant may then attempt to rebut); Abram v. State, 523 So. 2d 1018, 1019 (Miss. 1988) (same); Dedeaux v. State, 519 So. 2d 886, 888 (Miss. 1988) (same); Jackson v. State, 518 So. 2d 1219, 1218 (Miss. 1988) (same).

[219] *See* Chisholm v. State, 529 So. 2d 653 (Miss. 1988)(*Batson* must be applied retroactively to cases not yet final when *Batson* handed down); Taylor v. State, 524 So. 2d 565, 566 (Miss. 1988)(same).

[220] In both cases, the prosecutor used all but one of his peremptory challenges to exclude blacks. However, in neither case did the defendants attempt to rebut the prosecutor's explanations for the challenges during the *Batson* hearing. In *Chisholm*, the court noted that "several of the purportedly racially neutral reasons here offered for challenges appeared rather specious." *Chisholm*, 529 So. 2d at 636. However, since defense counsel offered no proof to rebut the prosecutor's explanations, the court refused to reverse, holding that even if the reasons offered were "masks for actual racially discriminatory purposes. . . it was incumbent upon Chisholm to come forward with proof when given the opportunity for rebuttal." *Id.* at 639. The court also noted in *Chisholm* that the acceptance of other black persons as jurors could not be used to defend against a *Batson* claim. *Id.* at 637.

[221] 532 So. 2d 602 (Miss. 1988).

[222] 529 So. 2d 537 (Miss. 1988).

[223] *Harris*, 532 So. 2d at 603. Defendant was convicted of murder in the Circuit

during voir dire, gave the jurors a detailed explanation of the facts he expected to prove at trial and then asked the jurors if the defendant could "depend upon [them] to bring in a verdict of not guilty."[224]

In affirming a guilty verdict, the court held that under Rule 5.02[225] of the Uniform Criminal Rules of Circuit Court Practice, "defense counsel . . . had no right to particularize what the facts would show and then ask the jurors if they would return a verdict of not guilty."[226]

In *Brown*, the court for the first time dealt with the issue of whether a juror's failure to respond during the voir dire process which leads to a violation of section 13-5-1[227] of the Mississippi Code may justify a new trial.[228] In that case, during voir dire at Brown's trial for rape, one of the jurors eventually selected to serve failed to respond when asked if she had a case pending in that court.[229] Section 13-5-1 prohibits jurors from serving when they have a case of their own pend-

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Court of Warren County. *Id.*

[224] *Id.* at 605.

[225] Rule 5.02 provides that:

> In the voir dire examination of jurors, the attorney shall direct to the entire venire questions only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked.

UNIF. CRIM. R. CIR. CT. PRAC. 5.02 [hereinafter Rule 5.02].

[226] *Id.* In a discussion of Rule 5.02, the court reiterated that attempts to exact a commitment from jurors about how they would decide a particular case were to be condemned. *Id.* The court noted that it is improper for counsel to go beyond the court's inquiries and ask questions not designed to either assure himself that jurors chosen "will give his client the benefit of every right to which [the client] is entitled under the law" or to "reveal or signify particular antipathies that could prejudice his client before any proposed juror." *Id.* at 605 (citing Phenizee v. State, 180 Miss. 146, 178 So. 579 (1938)). While counsel may ask questions designed to aid in the exercise of either challenges for cause or peremptory challenges, the questions should only be designed to "give some measure of the competence or capacity of jurors to decide the issues in the case." *Id.* (citing Murphy v. State, 246 So. 2d 920, 921 (Miss. 1971)). *See also* Derden v. State, 522 So. 2d 752, 754 (Miss. 1988) (district attorney's attempt to determine during voir dire whether jurors would disbelieve testimony of co-conspirator came perilously close to extracting promise from jury not to disbelieve co-conspirator).

[227] Section 13-5-1 provides in part:

> No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that time.

MISS. CODE ANN. § 13-5-1 (1972).

[228] *Brown*, 529 So. 2d at 538.

[229] *Id.* The juror, Kathy Maas, had a case pending which was set for trial on the Monday following Brown's trial. *Id.*

ing in the same court.[230] The Mississippi Supreme Court reversed and remanded for a new trial, holding that although violations of the portions of section 13-5-1 dealing with who is competent to serve as a juror will not vitiate a verdict,[231] "the statute . . . unequivocally prohibit[s] services of any juror who has a case pending in that court."[232]

In *Myers v. State*,[233] the court was faced with a situation wherein the juror asked a question of a witness while the witness was explaining an exhibit.[234] In declining to reverse, the court explained that although questioning of this type presents a great potential for prejudice, and will normally be reviewed for prejudice when a judge declines to step in to prevent possible prejudice; in this case no prejudice resulted since the juror did not ask for additional information, but only wanted an answer repeated.[235]

Although not selected for textual discussion, two cases came before the court concerning jury instructions,[236] and one case came before the

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[230] *Id.*

[231] The first part of §13-5-1 sets forth qualifications for jurors such as age, citizenship, literacy, lack of criminal convictions, etc. *Id.*

[232] *Brown*, 529 So. 2d at 540. The court held that a new trial should be granted where the parties stipulate that a juror has served in violation of the statute, even though neither party was aware of the violation during the trial. *Id.* At the same trial, another juror, J. T. Johnson, failed to respond when asked if he or anyone in his family had ever been on the opposite side of a lawsuit from the defense counsel. Johnson failed to mention that the defense attorney had once filed suit against Johnson's son-in-law. *Id.* at 538. In fact, defense counsel was representing Johnson's daughter in a divorce proceeding when he filed suit against her husband, Johnson's son-in-law. *Id.* at 539. Relying on the test set forth in Odom v. State, 355 So. 2d 1381, 1383 (Miss. 1978), which provides for a new trial when prejudice resulting to a defendant could reasonably be inferred from a juror's failure to respond, the court found no reversible error since the question was ambiguous as applied to Johnson, and further, that no prejudice resulted to Brown because even if Johnson had answered in the affirmative he would not have been subject to a challenge for cause. *Id.* at 539.

[233] 522 So. 2d 760 (Miss. 1988). The defendant, John Meyers, was convicted of murder. *Id.* at 761.

[234] *Id.* at 762. The witness, an investigator for the Sheriff's Department was asked, while explaining the various exhibits, what was found under the body. *Id.*

[235] *Id.*

[236] *See* Edlin v. State, 523 So. 2d 42 (Miss. 1988);Derden v. State, 522 So. 2d 752, 754 (Miss. 1988). In *Derden*, the court reiterated that Mississippi law is clear that the testimony of co-conspirators is to be regarded with suspicion and great caution. *Id.* Therefore, it was not error for the court to give a cautionary instruction to this effect to the jury since the State was relying on the testimony of co-conspirators. *Derden*, 522 So. 2d at 754.

In *Edlin*, the court found reversible error in the defendant's conviction for murder when the baliff indicated that the trial judge dealt with a potentially hung jury by instructing the baliff". . . to go back in there and tell them that we had put too much

court dealing with polling of the jury.[237]

VIII. Death Penalty

The Mississippi Supreme Court dealt with two cases[238] concerning the application of Mississippi law in light of the United States Supreme Court decision in *Maynard v. Cartwright*[239] which held that the "especially heinous, atrocious, or cruel" aggravating circumstance instruction in a death penalty case is unconstitutionally vague.[240] In *Maynard*, an Oklahoma case, the defendant was convicted of first-de-

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work and time on this case and for them to try again. . . ." *Edlin*, 523 So. 2d at 43. The court held that the instruction violated both Rule 5.03 of the Uniform Criminal Rules of Circuit Court Practice and the procedure set out in Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976) for giving instructions to a deadlocked jury. *Id.* at 44.

[237] *See* Beyersdoffer v. State, 520 So. 2d 1364 (Miss. 1988). In *Beyersdoffer*, the court reversed the defendant's burglary conviction because the trial judge attempted to clarify a juror's statement during a jury poll following the verdict. *Id.* at 1364. Following the guilty verdict, during a poll of the jury, one juror was asked if guilty was indeed his verdict. He responded "no sir," but indicated that he thought the defendant was guilty of aiding and abetting. However, the juror did not explain whether he found the defendant guilty of aiding and abetting before, or after, the commission of the crime. *Id.* at 1365. The judge interposed: "You mean aiding and abetting while it was going on, is that what you're talking about Mr. Martin?" *Id.* The Mississippi Supreme Court held that when the juror indicated that he did not concur in the verdict, it was reversible error for the trial judge to not immediately send the jury back for further deliberation.

[238] *See* Pinkney v. State, 538 So. 2d 329 (Miss. 1988); Clemons v. State, 535 So. 2d 1354 (Miss. 1988). Although not discussed textually, the court also rendered a decision in Reddix v. State, DP-11 (Miss. Aug. 24, 1988) that the court could determine from a trial record whether the requisites of Emmund v. Florida, 458 U.S. 702 (1982) were met. *Reddik*, Slip op. at 4. In *Emmund*, the United States Supreme Court required that a jury finding of intent to kill was necessary before a death sentence could be carried out. *Emmund*, 458 U.S. at 702. In *Reddix*, the Mississippi Supreme Court held that the evidence reflected in the trial court record met the *Emmund* test and reinstated the death penalty. *Reddix*, slip op. at 5-7.

[239] 108 S.Ct. 1853, 1855 (1988). *Maynard* held that:

> (1) the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague, as it did not offer sufficient guidance to the jury in deciding whether to impose the death penalty; (2) the presence of another, unchallenged, aggravating circumstance did not sustain the death sentence where Oklahoma had no procedure for attempting to save a death penalty when one of several aggravating circumstances was held to be invalid or unsupported by evidence; and (3) the effect of recent decisions of the Oklahoma Court of Criminal Appeals limiting the aggravating circumstances to cases in which torture or serious physical abuse was present was to be decided in the first instance by state courts.

108 S.Ct. at 1853-54.

[240] *Id.* at 1855.

gree murder and sentenced to death under the state's death penalty statute.[241] The death sentence was imposed by the jury after it found the evidence to show the existence of two aggravating circumstances as defined by the statute. These were: (1) the circumstance "that the murder was 'especially heinous, atrocious, or cruel'," and (2) the circumstance that "the aggravating circumstances outweighed the mitigating evidence in the case."[242] Eventually, the United States Court of Appeals for the Tenth Circuit, sitting en banc, found that the "especially heinous, atrocious, or cruel" circumstance was unconstitutionally vague under the eighth amendment's cruel and unusual punishment clause.[243]

In *Clemons v. State*[244] and *Pinkney v. State*,[245] the Mississippi Supreme Court held that the identical instruction was not unconstitutional under Mississippi law for several reasons.

In *Clemons*, the defendant, Chandler Clemons, was convicted of capital murder in the shooting death of a pizza delivery man.[246] The jury imposed the death penalty after finding the presence of two aggravating circumstances.[247] Although no objection was made to the "especially heinous" instruction, the court, in light of *Maynard* and section 99-19-105 of the Mississippi Code, considered the issue anyway.[248] In affirming the death penalty given to Chandler, the court distinguished

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[241] *Id.*

[242] *Id.*

[243] *Id.* at 1857. The appeals court held that it was unconstitutionally vague because it allowed application of the circumstance based on all the facts of a case. *Id.*

[244] 535 So. 2d 1354 (Miss. 1988).

[245] 538 So. 2d 329 (Miss. 1988).

[246] *Clemons*, 535 So. 2d at 1355.

[247] *Id.* at 1361-62. The lower court granted the State a jury instruction which stated:

> Consider only the following elements, if any, of aggravation in determining whether the death penalty should be imposed: (1) the Capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain; (2) the Capital Offense was especially heinous, atrocious, or cruel.

Id. at 1361.

[248] *Id.* at 1362. Section 99-19-105 sets forth the court's responsibility for review of death penalty cases. The section provides in part:

> (1) whenever the death penalty is imposed, . . . the sentence shall be reviewed . . . on the record by the Mississippi Supreme Court.
>
> (2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.
>
> (3) With regard to the sentence the court shall determine. . . (b) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101.

MISS. CODE ANN. § 99-19-105 (Supp. 1988).

the Mississippi case from *Maynard* in two ways. First, the court reasoned that unlike Mississippi, Oklahoma "had no procedure for addressing the correctness of a death penalty when one of several aggravating circumstances found by the jury was held to be invalid or unsupported by evidence."[249] The court reasoned that even if the "especially heinous" instruction were invalid, it (the Mississippi Supreme Court) had consistently held through the years that where a finding is made of more than one aggravating circumstance, and one of them is found to be invalid, "a remaining valid aggravating circumstance will nonetheless support the death penalty verdict."[250]

Additionally the court found that, unlike Oklahoma, Mississippi had placed a limiting construction on the "especially heinous" instruction and was therefore not in violation of the portion of *Maynard* holding that the instruction was invalid because lack of a limiting construction gave a jury "unchallenged discretion."[251] The court noted that in at least two cases[252] it had placed a limiting construction on the instruction which was implicitly recognized by the *Maynard* court.[253]

In *Pinkney*, the court upheld a death penalty sentence imposed on the defendant[254] after consideration of two aggravating circumstances, one of which was the "especially heinous" circumstance.[255] In *Pinkney*,

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[249] *Id.* In Oklahoma, if one aggravating circumstance were found to be invalid, the court would simply change the death sentence to life imprisonment. *Id.* There was no chance to cure consideration of an invalid aggravating circumstance on appeal. *Id.* (citing *Maynard*, 108 S.Ct. at 1860).

[250] *Id. See* Zant v. Stephens, 462 U.S. 862 (1983); Edwards v. Scorggy, 849 F.2d 204 (5th Cir. 1988); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987); Nixon v. State, 533 So. 2d 1078 (Miss. 1987); Lockett, v. State, 571 So. 2d 1317, 1336 (Miss. 1987); Edwards v. State, 441 So. 2d 84, 92 (Miss. 1983).

[251] *Clemons*, 535 So. 2d at 1363.

[252] *See* Coleman v. State, 378 So. 2d 640 (Miss. 1979) (court adopted limiting construction found in Spinkellink v. Wainwright, 578 F.2d (5th Cir. 1978) of "crime which is unnecessarily torturous to the victim.") In Evans v. State, 422 So. 2d 737 (Miss. 1982), the Mississippi Supreme Court limited the "especially heinous" instrucion to cases where "mental torture and aggravation" were inflicted on the victim. *Id.* at 743. *See also* Billiot v. State, 454 So. 2d 445, 464-65 (Miss. 1984) (approved *Coleman* elaboration).

[253] *Clemons*, 535 So. 2d at 1363-64. The Mississippi Supreme Court relied on language in *Maynard* stating that:

> We also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstances that would be constitutionally acceptable.

Id. at 1364 (quoting *Maynard*, 108 S.Ct. at 1859-60).

[254] *Pinkney*, 538 So. 2d at 330. The defendant, Bobby Joe Pinkney, was convicted of capital murder and sentenced to death for the beating death of Tracey Hickman. *Id.* at 333.

[255] *Id.* at 355. The other circumstance was commission ofthe crime of burglary. *Id.*

however, the court found the "especially heinous" circumstance to be an invalid aggravating circumstance, but upheld the sentence because the other aggravating circumstance, burglary, was valid.[256] The court did hold, however, that in the future, "capital sentencing juries of the State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of "especially heinous, atrocious, or cruel."[257] This holding may, in part, have been in response to a strong dissent put forth by Justice Robertson in *Clemons* (and echoed in *Pinkney*).

In *Clemons*, Justice Robertson reasoned that the limiting construction placed on the "especially heinous" instruction by the Mississippi court could not be relied upon to uphold the sentence because the jury was never informed about the limits of the instruction.[258] He argued additionally, that the other circumstance could not be relied upon to uphold the sentence because it was not the role of the court to decide that the jury might have relied upon the second circumstance standing alone.[259]

In a brief dissent from the sentencing phase of the trial in *Pinkney*, Justice Robertson argued for reversal of the death sentence based on the reasons set forth in his dissent in *Clemons*.[260]

IX. Jury Instructions

Although not selected for textual treatment, in the area of jury instructions, the Mississippi Supreme Court considered cases involving lesser included offenses,[261] jury nullification,[262] acquittal instruction if

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[256] *Id.*

[257] *Id.* at 357.

[258] *Clemons*, 535 So. 2d at 1368 (Robertson, J., dissenting). Justice Robertson noted that "it may be fairly said that since *Coleman* we have consistently ignored its teaching . . . *Cartwright* teaches that *Coleman* is not worth the paper it is written on if it isn't communicated to the sentencing jury, and it wasn't here." *Id.*

[259] *Id.* at 1371.

[260] *Pinkney*, 538 So. 2d at 361 n.1 (Robertson, J., dissenting). Justice Robertson concurred in finding Pinkney guilty of capital murder, but urged reversal of the death sentence and remand for a new trial on the matter of sentence only. *Id.*

[261] *See* Griffin v. State, 533 So. 2d 444, 447 (Miss. 1988) (even where defense to charge of rape is consent, reversible error to refuse lesser included offense instruction of simple assault).

[262] *See* Davis v. State, 520 So. 2d 493, 494 (Miss. 1988) (no right to jury nullification instruction).

engaged in illegal conduct,[263] self-defense,[264] and the fact that the terms "implied" and "inferred" are legally synonymous.[265]

In *Nicholau v. State*,[266] the court addressed the issue of giving supplemental instructions to the jury after it had retired. The court in *Nicholau* reversed and remanded a capital murder conviction where the trial judge gave the jury a supplemental instruction after retirement which defined "malice aforethought."[267] The court observed that it was "unnecessary and unwise for the circuit court to attempt to define 'malice' in jury instructions."[268] The court further stressed that whenever a judge gives supplemental instructions to a jury after it retires to consider its verdict, he must be very careful in selecting his words so as not to confuse the jury.[269] In *Nicholau*, reversible error was committed because the malice definition was ambiguous and could only have confused the jury.[270]

In *Hailey v. State*,[271] the court clarified its 1985 opinion in *McBrayer v. State*[272] in which it was held that the statutory rape provision of section 97-5-21 of the Mississippi Code would not be subsumed into the child fondling statute.[273] Following *McBrayer*, uncertainty arose as to whether fondling of a child would be a lesser included offense of statutory rape. The issue arose in *Hailey* when the defendant

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[263] *See* O'Bryant v. State, 530 So. 2d 129, 133 (Miss. 1988) (no right to ask for acquittal instruction where individual engaged in illegal conduct with loaded pistol which resulted in accidental death of another).

[264] *See* Stoop v. State, 531 So. 2d 1215, 1219 (Miss. 1988) (reversal warranted where almost identical jury instructions were contradictory and forced jury to decide which of instructions correctly portrayed law).

[265] *See* Taylor v. State, 536 So. 2d 1326, 1328 (Miss. 1988) (inferred and implied are legally synonymous terms where conspiracy may be either inferred or implied from proof).

[266] 534 So. 2d 168 (Miss. 1988).

[267] *Id.* at 174. This was in response to some questions submitted to the court by the jury asking the judge to further define "malice aforethought:" and "beyond a reasonable doubt." *Id.* The judge declined to elaborate further on the "reasonable doubt" instruction. *Id.*

[268] *Id.* (citing Smith v. State, 237 Miss. 626, 114 So. 2d 676 (1959)).

[269] *Id.* at 175.

[270] *Id.* at 174. The court found error in the definition by stating that the definition first states that "malice aforethought exists where the person doing the act which causes the death has *an intention* to cause death or *grievous bodily harm* to any person." *Id.* The court found this to be in error because "an essential element of the crime of murder is the felonious and premeditated intent to kill, not simply to do grievous bodily harm." *Id.* (citing Pitts v. State, 241 So. 2d 668 (Miss. 1970)).

[271] 537 So. 2d 411 (Miss. 1988).

[272] 467 So. 2d 647 (Miss. 1985).

[273] *McBrayer*, 467 So. 2d at 648.

was indicted for the alleged rape of a thirteen year-old girl, but was convicted of child fondling on the basis of a lesser included offense instruction.[274] The court reversed and remanded Hailey's conviction of child fondling because the indictment failed to inform Hailey of the charge of fondling. The court reasoned that since the indictment was for rape and since child fondling was not a necessarily included offense of rape, then under Rule 2.05 of the Uniform Criminal Rules of Circuit Court Practice, the indictment had not sufficiently notified Hailey of the nature and cause of the accusation against him.[275]

X. Right to Counsel

Although not selected for textual comments, the court decided a number of cases where ineffective assistance of counsel was alleged.[276] The right to counsel at pre-indictment line-ups was addressed in two cases, *Livingston v. State*[277] and *Jimpson v. State*.[278] Following his conviction on the charge of rape, the defendant in *Livingston* argued on appeal that his sixth amendment right to counsel had been violated because he was not provided with counsel at his pre-indictment line-up.[279] While acknowledging that the right to counsel may attach to pre-indictment line-ups in Mississippi,[280] the court held that such an error would not be entertained when raised for the first time on appeal, particularly in the absence of an affirmative showing in the record indicating that counsel was not present at the line-up.[281] In *Jimpson*, the

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[274] *Hailey*, 537 So. 2d at 412.

[275] *Id.* at 413.

[276] *See* Reed v. State, 536 So. 2d 1336, 1338 (Miss. 1988) (two-prong *Strickland* test will be applied in deciding whether professional errors have occurred and whether prejudice has resulted); Corly v. State, 536 So. 2d 1314, 1317 (Miss. 1988) (although right to counsel attaches when defendant is accused of crime, no error in delay of appointment unless defendant can show adverse effect); Yarbrough v. State, 529 So. 2d 659, 661 (Miss. 1988) (*Strickland* test violation occurs where defense attorney fails to conduct independent investigation of case); Cabello v. State, 524 So. 2d 313, 316 (Miss. 1988) (inexperience alone will not, as a matter of law, make counsel ineffective, since counsel is presumed competent until proven otherwise); Byrd v. State, 522 So. 2d 756, 759 (Miss. 1988)(defendant will not be entitled to continuance to substitute retained counsel where counsel's conduct does not fall below *Strickland* standard); Reynolds v. State, 521 So. 2d 914, 918 (Miss. 1988) (when defendant challenges his guilty plea on grounds of ineffective assistance of counsel, unprofessional errors of substantial gravity must be shown).

[277] 519 So. 2d 1218 (Miss. 1988).

[278] 532 So. 2d 985 (Miss. 1988).

[279] *Livingston*, 519 So. 2d at 1220.

[280] *Id.* at 1220-21. *See* Page v. State, 495 So.2d 436 (Miss. 1986)(attachment of right to counsel); Cannaday v. State, 455 So. 2d 713 (Miss. 1984)(same).

[281] *Livingston*, 519 So. 2d at 1221.

court refused to reverse a life sentence where the defendant was denied assistance of counsel at a line-up.[282]

The right to counsel also arose in the contest of voluntary confessions in two cases heard by the court in 1988.[283] In *Burnside v. State*[284] the defendant's conviction for rape was reversed and remanded because the State did not meet its burden of proving that the defendant's confession was voluntary.[285] The court stated that under prior case law, the State has the burden of proving a confession is voluntary.[286] The burden may be met by the testimony of an officer, or someone else with knowledge of the facts, that no coercion was used or threats made in obtaining the confession.[287] If the defendant then puts on evidence or testifies that violence or threats of violence induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed or give a reason for the absence of such witnesses.[288] In *Burnside*, the court reversed because the State failed to produce two witnesses to the confession and further failed to explain their absences.[289]

In *Minnick v. State*[290] the court affirmed a death sentence where the defendant knowingly waived his sixth amendment rights to counsel.[291] In that case, the defendant, Robert Minnick, invoked his fifth amendment right and met with his appointed counsel who told Minnick not to speak to anyone else about the charges against him.[292] Subsequent to this meeting, Minnick met with a deputy sheriff and gave a confession without the presence of his attorney.[293] Based on the facts presented and the initial meeting with the court-appointed counsel, the

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[282] *Jimpson*, 532 So. 2d at 989. The doctrine was first recognized in Chapman v. California, 386 U.S. 18 (1967) and stands for the proposition that some constitutional errors are so unimportant in the setting of a particular case that automatic reversal of a conviction is not warranted. *Chapman*, 386 U.S. at 21.

[283] *See* Burnside v. State, 537 So. 2d 420, 424 (Miss. 1988) (State must meet burden of proving voluntariness of confession or reversal warranted); Minnick v. State, No. DP-79 (Miss. Dec. 14, 1988) (guilty verdict upheld where defendant made concious decision to relinquish right to cousnel).

[284] 537 So. 2d 420 (Miss. 1988).

[285] *Id.* at 424.

[286] *Id.* (citing Agee v. State, 185 So. 2d 671 (Miss. 1966).

[287] *Id.* This makes out a prima facie case for the State on the question of voluntariness. *Id.*

[288] *Id.*

[289] *Id.*

[290] No. DP-79 (Miss. Dec. 14, 1988).

[291] Slip op. at 10-11.

[292] *Id.* at 7-8.

[293] *Id.* at 10.

court found no error below and held that a knowing waiver of rights had taken place.[294] Dissenting from the majority, Justice Robertson stated that the rule in civil cases, that a lawyer is forbidden to communicate with the opposing party who has a lawyer without that lawyer being present, should be extended to criminal cases as well.[295]

XI. SENTENCING

The Mississippi Supreme Court rendered opinions in several cases concerning the sentencing of a criminal defendant.[296] In *Huntley v. State*,[297] the court addressed the issue of whether, under the state's habitual offender statutes,[298] time served in a county jail is the

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[294] *Id.* at 12.

[295] *Id.* (Robertson, J. dissenting).

[296] *See* Powell v. State, 536 So. 2d 13, 17 (Miss. 1988)(involving restitution by criminal defendant); Arnett v. State, 532 So. 2d 1003, 1012 (Miss. 1988)(conditioning seven years of defendant's sentence on payment of fine held improper); Garlotte v. State, 530 So. 2d 693, 694 (Miss. 1988)(commendable procedure for circuit court to file transcript of guilty plea within days of summary disposition); Harris v. State, 527 So. 2d 647, 651 (Miss. 1988)(sentencing under habitual offender statute mandatory if defendant falls within the statutory provisions); King v. State, 527 So. 2d 641, 645 (Miss. 1988)(serving one year on concurrent sentences for different convictions of separate crimes amounted to serving more than one year on each sentence under habitual offender statute); Neal v. State, 525 So. 2d 1279, 1284 (Miss. 1988)(not error, in capital case, if instructions to jury are general, all inclusive with regard to mitigating factors); Huntley v. State, 524 So. 2d 572, 574 (Miss. 1988)(under habitual offender statute, time served in county jail is equivalent to time served in state or federal prison); Aldridge v. State, 524 So. 2d 330, 331 (Miss. 1988)(defendant who has not been disadvantaged by Post Conviction Relief Act has no standing); Carter v. State, 524 So. 2d 324, 325 (Miss. 1988)(sentence of delinquent child was held indefinite, since trial court retained right to change sentence prior to completion of term); Jones v. State, 523 So. 2d 957, 960 (Miss. 1988)(State must inform defendant, in indictment, that he is being tried as habitual offender); Clowers v. State, 522 So. 2d 762, 764-65 (Miss. 1988)(trial court may properly reduce mandated sentence through proper exercise of constitutional principles of proportionality); State v. Bradford, 522 So. 2d 227, 228 (Miss. 1988)(inmate who escapes after being assigned to leave jail may be given lesser sentence of six months for escape); Childs v. State, 521 So. 2d 882, 883 (Miss. 1988)(evidence sufficient to support verdict of negligently killing another while under influence of liquor); Ellis v. State 520 So. 2d 495, 496 (Miss. 1988)(state constitutional double jeopardy provision prohibited new sentencing hearing as to habitual offender requirements); Craig v. State, 520 So. 2d 487, 492 (Miss. 1988)(defendant convicted of manslaughter by culpable negligence in operation of motor vehicle); Holliday v. State, 519 So. 2d 1226, 1226 (Miss. 1988)(application for post-conviction relief deficient); Cowart v. State, 519 So. 2d 896, 897 (Miss. 1988)(plea-bargained guilty plea to assault with intent to rape is lesser included constituent offense under indictment for forcible rape).

[297] 524 So. 2d 572 (Miss. 1988).

[298] *Huntley*, 524 So. 2d at 573. Mississippi has two habitual offender statutes. Under

equivalent of time served in a state or federal penal institution.[299] As required by the habitual offender statute, prior to his conviction of receiving embezzled funds, Huntley had served two separate terms in state prison.[300] His first term was in Parchman and exceeded one year.[301] However, he began serving his second term in the Harrison County Jail on July 12, 1979 and was transferred to Parchman on June 23, 1981 where he remained until June 5, 1982.[302] The court cited section 47-5-112(1) of the Mississippi Code for the proposition that any person sentenced or placed under the custody of the department of corrections may serve all or part of his sentence in a county jail.[303] Further, the court mentioned section 47-5-703 of the Mississippi Code which defines "prison system" as "[t]he prisons operated by the Mississippi Department of Corrections and in those local or county jails or other facilities authorized to house state inmates."[304] The Mississippi Supreme Court affirmed Huntley's conviction, concluding that based on the cited authority the legislature obviously intended the time served in a county or local jail to count towards the imprisonment term provided for in the sentence.[305]

A form of sentencing that may violate the equal protection clause of the fourteenth amendment of the United States Constitution was addressed in *Arnett v. State*.[306] Joseph Junior Arnett was convicted of possession of more than a kilogram of marijuana and sentenced to fourteen years imprisonment with seven years suspended if he paid a

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MISS. CODE ANN. § 99-19-81 (Supp. 1988) a person who is convicted of a felony and has also been convicted of two previous felonies or federal crimes on charges which arose out of separate incidents separately brought, and who was sentenced to separate terms of one year or more in any state and/or federal prison shall receive the maximum sentence without possibility of parole or probation. MISS. CODE ANN. § 99-19-83 (Supp. 1988) is substantially similar to the aforementioned statute, except that the person must have been sentenced and served one or more years for the previous felonies and life imprisonment must be imposed if one of the felonies was a crime of violence.

[299] *Huntley*, 524 So. 2d at 574. Johnny Lee Huntley was convicted of receiving embezzled funds and sentenced to serve life imprisonment without parole under MISS. CODE ANN. § 99-13-83 (Supp. 1988). *Huntley*, 524 So. 2d at 573.

[300] *Huntley*, 524 So. 2d at 574.

[301] *Id.*

[302] *Id.* Huntley spent approximately eleven months at Parchman during his second term. *Id.*

[303] *Id.*

[304] *Id.* The court also stated that in construing the habitual offender statutes consideration must be given to the purpose of the statute, and the intent of the legislature in enacting it. *Id.*

[305] *Id.*

[306] 532 So. 2d 1003 (Miss. 1988).

$125,000 fine.[307] Arnett argued that conditioning the suspension of his sentence upon the payment of a fine violated the equal protection clause of the fourteen amendment.[308] The Mississippi Supreme Court affirmed the conviction, but remanded for proper sentencing, holding that it was error to condition seven years of Arnett's sentence upon payment of a fine.[309] The court reasoned that under *Payne v. State*,[310] the sentence was indefinite and, therefore, not in line with section 47-7-33[311] of the Mississippi Code because it allowed the trial court to suspend the sentence at any time prior to the completion of the term.[312]

The case of *Jones v. State*[313] confronted the issue of giving a criminal defendant notice that he is to be tried as a habitual offender for possession with the intent to distribute a controlled substance.[314] Doubling the statutory sentence, the trial court sentenced Jones to sixty years without the possibility of parole.[315] On appeal, Jones argued that the indictment was flawed in that the State sought a habitual offender sentence.[316] The Mississippi Supreme Court cited *Bandy v. State*[317] for the proposition that the indictment must do more than list previous convictions, it must inform the defendant that he is being tried as a habitual offender.[318] However, the court stated that in mak-

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[307] *Arnett*, 532 So. 2d at 1007.

[308] *Id.* at 1012.

[309] *Id.*

[310] 462 So. 2d 902 (Miss. 1984). *Payne* involved a similar sentence of seven years with two years suspended upon the payment of a fine. *Id.* at 904. The Mississippi Supreme Court stated that the equal protection issue was premature since there was no finding of indigency. *Id.* However, the court did remand for resentencing, finding that the sentence was not definite. *Id.* at 906.

[311] MISS. CODE ANN. § 47-7-33 (1972). Section 47-7-33 allows the suspension of a sentence, but forbids the suspension after the defendant has begun to serve the sentence. *See* Denton v. Maples, 394 So. 2d 895, 898 (Miss. 1985)(under § 47-7-33 suspension can only be made immediately after conviction or plea of guilty).

[312] *Arnett*, 532 So. 2d at 1012.

[313] 523 So. 2d 957 (Miss. 1988).

[314] *Jones*, 523 So. 2d at 958.

[315] *Id.* The trial judge doubled the statutory sentence of thirty years because Jones was a subsequent offender under MISS. CODE ANN. § 41-29-147 (1972), and denied the possibility of parole since Jones was a habitual offender within the meaning of MISS. CODE ANN. § 99-19-81 (Supp. 1988). *Jones*, 523 So. 2d at 958.

[316] *Jones*, 523 So. 2d at 960. The State argued that it had met all the requirements of Rule 6.04 of the Uniform Criminal Rules of Circuit Court Practice which requires the indictment to include both the principle charge as well as a charge and description of previous felonies. *Id.* at 960.

[317] 495 So. 2d 486 (Miss. 1986).

[318] *Jones*, 523 So. 2d at 960.

ing a motion in limine and a motion for a continuance, the appellant explained that if convicted, he could be given enhanced sentencing.[319] The Mississippi Supreme Court held that even though the habitual offender language was not in the indictment, there was no error since Jones had actual notice that the State would ask for sentencing under the habitual offender statutes.[320]

XII. Elements of a Crime

In several cases the Mississippi Supreme Court discussed the elements of certain crimes.[321] One of these cases was *Pruitt v. State*.[322] John Richard Pruitt was found guilty of attempted rape, and was sentenced to ten years imprisonment.[323] On appeal, Pruitt argued that the trial court erred in not granting his motion for a directed verdict, since

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[319] *Id.*

[320] *Id.*

[321] *See* Wheeler v. State, 536 So. 2d 1347, 1352 (Miss. 1988) (proof of other crimes is admissible where offense charged is so interrelated with that offered to be proved that two constitute single transaction or occurrence); Flurry v. State, 536 So. 2d 1340, 1341 (Miss. 1988)(premises upon which contraband is found should be in exclusive control of accused, absent some evidence connecting him with contraband); Moore v. State, 534 So. 2d 557, 559-60 (Miss. 1988)(when defendant claims entrapment, trial court should look at inducement by State as well as defendant's predisposition); Henderson v. State, 534 So. 2d 554 (Miss. 1988)(evidence did not support defendant's conviction for obtaining money under false pretenses); Hartfield v. State, 532 So. 2d 1237, 1239 (Miss. 1988)(testimony of co-perpetrators was admissible at trial for uttering as it was direct evidence not evidence of other criminal activity); Monk v. State, 532 So. 2d 592, 599 (Miss. 1988)(to prove felonious child abuse, pattern of abuse not required); Rowland v. State, 531 So. 2d 627, 630 (Miss. 1988)(elements of forgery); King v. State, 530 So. 2d 1356, 1358-1359 (Miss. 1988)(prima facia case for defense of entrapment); Davis v. State, 530 So. 2d 694, 702 (Miss. 1988) (gun as deadly weapon); Pruitt v. State, 528 So. 2d 828 (Miss. 1988)(abandonment of attempt to rape); Banks v. State, 525 So. 2d 399, 401 (Miss. 1988)(police officer may make felony arrest, as long as he has reasonable grounds to believe that suspect committed offense); Smith v. State, 523 So. 2d 1028, 1030 (Miss. 1988)(peremptory instruction request sufficient to raise issue of lack of proof to support conviction); Kemp v. State, 518 So. 2d 656, 660 (Miss. 1988)(reverse drug sale embraces all elements of entrapment).

[322] 528 So. 2d 828 (Miss. 1988).

[323] *Pruitt*, 528 So. 2d at 829. The alleged attempted rape took place at Terry's Lounge in Gulfport. *Id.* The evidence showed that Pruitt entered the ladies' room, seized Robin Gatlin by the throat and told her to take off her clothes or he would beat her face in with his motorcycle helmet. *Id.* Gatlin immediately began to talk to Pruitt and he took his hand from her throat. *Id.* Pruitt told Robin that she was free to go, but she was afraid to walk past him. *Id.* The two went out into the bar where Robin sat next to Pruitt for a short period of time before sitting with a woman that she had told Pruitt was her neighbor.*Id.*

he had abandoned his attempt to rape his victim.[324] The Mississippi Supreme Court stated that the crime of attempt has three elements: 1) an intent to commit a certain crime; 2) an ineffectual act done toward its commission; and 3) failure to consummate its commission.[325] The court held that Pruitt had done everything needed to constitute an attempt.[326] However, it was concluded that Pruitt had abandoned his intent to rape his victim, since he had told her that she was free to go and that he did not touch her after he released her.[327] The Mississippi Supreme Court accordingly reversed, holding that there was not sufficient evidence to show that Pruitt had not abandoned his attempt to rape his victim.[328]

In *Rowland v. State*[329] the Mississippi Supreme Court addressed the elements of the crime of forgery. Rowland forged a Certificate of Incorporation, bearing the seal of the Secretary of State, in order to induce Sam Scarbrough to part with $17,500 for his supposed part of a Taco Bell franchise.[330] Rowland was convicted in the Circuit Court of Tate County for the forgery of the Secretary of State's seal, and sentenced to fifteen years as a habitual offender.[331] On appeal, it was contended that the State had failed to make a jury question on forgery.[332] The court explained that to show forgery three things must exist: 1) an instrument must be falsely made or altered, in writing; 2) there must be fraudulent intent; and 3) the instrument must appear to be capable of effecting a fraud.[333] The court concluded that the elements of forgery were clearly present, in that the seal was proven false, that the intent in using the seal was to defraud Scarbrough, and the seal was

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[324] *Id.* at 830.

[325] *Id. See* Edwards v. State, 500 So. 2d 967, 969 (Miss. 1986)(attempted robbery).

[326] *Id.* at 830-31. The court explained that Pruitt had announced his intent to rape Ms. Gatlin. *Id.* The court also explained that there was an overt act toward the commission of rape when Pruitt grabbed the victim by the throat threatening to beat her up if she did not take off her clothes. *Id.* at 831.

[327] *Id.* at 831. It was stated that in order for Pruitt to abandon his intent he must have voluntarily abandoned his intent without resistance of the victim or the intervention of a third party. *Id.*

[328] *Id.*

[329] 531 So. 2d 627 (Miss. 1988).

[330] *Rowland*, 531 So. 2d at 628.

[331] *Id.* at 629. Rowland was charged pursuant to MISS. CODE ANN. § 97-21-47 (1972), which provides for a forgery conviction for anyone who forges or counterfeits the seal of any public office with the intent to defraud.

[332] *Rowland*, 531 So. 2d at 630.

[333] *Id. See* State v. Ellis, 161 Miss. 361, 137 So. 102, 103 (1931)(involving forged marriage license). The *Rowland* court also explained that the alleged forged writing must be one which, if genuine, may injure another. *Rowland*, 531 So. 2d at 630.

actually used to defraud Scarbrough.[334]

Mississippi law regarding the entrapment defense has become confusing over the years through several cases. The Mississippi Supreme Court made an attempt to clear up some of this confusion in *Moore v. State*.[335] Law enforcement agents sold a forty-pound bale of marijuana to Luke Moore, and then arrested him for possession with intent to sell.[336] Moore was sentenced to twenty-four years imprisonment and ordered to pay a $40,000 fine.[337] Moore contended that since the State provided the marijuana, that he, as a matter of law, was entrapped.[338] The Mississippi Supreme Court stated that there is entrapment when law enforcement authorities induce a person to commit a crime he was not predisposed to commit otherwise.[339] The court also explained that evidence of predisposition is always relevant and admissible where entrapment is pled as a defense.[340] When a defendant claims entrapment, the trial court should first look to whether the crime was induced by the State; and secondly to the defendant's predisposition to commit the crime.[341] It is left up to the trier of fact to weight the State's involvement against the defendant's predisposition.[342] On the issue of State involvement, the court stated that law enforcement participation can become so intrusive that the only remedy is to let the defendant go free even if he had the predisposition to commit the crime.[343] The Mississippi Supreme Court held that Moore was ready, willing and able to

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[334] *Rowland*, 531 So. 2d at 630.

[335] 534 So. 2d 557 (Miss. 1988).

[336] *Moore*, 534 So. 2d at 557. The State had an informant offer the marijuana to Moore and then set up a time for him to pick up and pay for the marijuana. *Id.* at 558. At the time of the meeting Mississippi Bureau of Narcotics' agents were present to arrest Moore. *Id.*

[337] *Id.* at 557.

[338] *Id.* at 558.

[339] *Id.*

[340] *Id. See* Sayer v. State, 533 So. 2d 464, 466 (Miss. 1988)(evidence of defendant's prior drug trafficking in marijuana admissible where entrapment defense is raised in subsequent prosecution for selling marijuana).

[341] *Moore*, 534 So. 2d at 559. The court explained that previous law had drawn a distinction between cases involving the defendant's predisposition, and the misconduct of law enforcement officials. *Id.*

[342] *Id.* Where there is weak evidence of the defendant's predisposition and heavy State involvement, the entrapment defense should be sustained. *Id.* at 560. However, the court explained, substantial State involvement may be overcome, where there is powerful evidence of predisposition. *Id.*

[343] *Id.* The defendant must be freed if the inducement is such that criminal offense will be created by those other than the accused. *Id.* The defendant should also be discharged where the State's conduct is outrageous or shocking. *Id.*

buy the marijuana, suggesting that he had a substantial predisposition, and that the inducement by the State was slight.[344]

XIII. CONFESSIONS

The Mississippi Supreme Court addressed the issue of the admissibility of confessions of individuals held under youth court jurisdiction in *Smith v. State*.[345] Statie Smith, a sixteen year old, was arrested on charges of burglary, resisting arrest, and assault upon a law enforcement officer, incident to his arrest as a rape suspect.[346] Two days later the Youth Court appointed counsel and authorized a criminal investigator to question Smith if one of his parents was present.[347] Later that same day Smith and his mother waived Smith's *Miranda* rights, then Smith confessed to the rape in the presence of the investigator and his mother.[348] After his conviction for rape,[349] Smith appealed, asserting that the confession was secured in violation of the Youth Court Act,[350] and was thus inadmissible since the investigator knew Smith had counsel but did not notify him or obtain his consent.[351] The Mississippi Supreme Court affirmed the circuit court's admission of the confession, holding that "notwithstanding the interrogating officer's knowledge that the defendant had counsel, the interrogation did not violate sec-

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[344] *Id.*

[345] 534 So. 2d 194 (Miss. 1988).

[346] *Smith*, 534 So. 2d at 195. Law enforcement officers attempted to arrest Smith as a rape suspect, but in the course of the arrest Smith became frightened, pulling a gun and assaulting one of the officers. *Id.*

[347] *Id.*

[348] *Id.* Smith called Investigator Kenneth Dickerson to his cell telling him that he wanted to make a statement. *Id.* No one contacted Smith's court-appointed attorney, Kizer Jones. *Id.*

[349] *Id.* Smith was convicted of rape in the Circuit Court of Marshall County and sentenced to a term of twenty years. *Id.*

[350] *Id.* Specifically, Smith claimed that his confession was allowed in violation of MISS. CODE ANN. § 43-21-311(4)(Supp. 1986) which provides that:

> Except for the child's counsel, guardian and litem and authorized personnel of the youth court, no person shall interview or interrogate the child held in a detention or shelter facility unless approval therefor has first been obtained from the judge or his designee. When a child is in a detention or shelter facility is represented by counsel or has a guardian ad litem, no person may interview or interrogate the child concerning the violation of a state or federal law, or municipal or county ordinance by the child unless in the presence of his counsel or guardian ad litem or with their consent.

Smith, 534 So. 2d at 196 (citing MISS. CODE ANN. § 43-21-311(4) (Supp. 1986).

[351] *Smith*, 534 So. 2d at 195.

tion 43-21-311(4) of the Mississippi Code."[352] In dictum, however, the court stated that where no guardian ad litem has been appointed it would be better practice to secure the consent or presence of counsel.[353]

The Mississippi Supreme Court discussed long standing policy concerning the admissibility of confessions in *Chisolm v. State*.[354] Rickey Chisolm was found guilty of armed robbery and was sentenced to thirty years in the custody of the Mississippi Department of Corrections.[355] Chisolm asserted that the trial court erred in admitting his confession into evidence.[356] Scott County Sheriff Glen Warren testified that Chisolm was informed of his rights, then voluntarily confessed in the presence of Deputy Sheriff Reed and himself.[357] Deputy Reed corroborated Warren's testimony, specifically stating that Chisolm was aware of the charge against him prior to making his confession.[358] Chisolm testified that he was unable to read and write and that he was not informed of the charge against him until the day he confessed.[359]

The Mississippi Supreme Court began its discussion by stating that a confession must be given voluntarily and freely, without promises or threats.[360] Citing *Agee v. State*[361] the court explained that the State's burden of proving voluntariness of a confession may be met by the testimony of a police officer, or another with knowledge of the facts, that the confession was voluntary.[362] The court held that the finding that Chisolm's confession was voluntary and that he had made a competent waiver of his privilege against self-incrimination was supported by substantial evidence.[363]

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[352] *Id.* at 196. *See* In Interest of W.R.A., 481 So. 2d 280 (Miss. 1985)(where defendant was questioned, as in instant case, but neither he nor his mother informed officers that he had counsel).

[353] *Smith*, 534 So. 2d at 196.

[354] 529 So. 2d 630 (Miss. 1988).

[355] *Chisolm*, 529 So. 2d at 632. Chisolm was charged and found guilty of the October 8, 1984 armed robbery of 70 year-old Verner Lee Gatewood. *Id.*

[356] *Id.* at 633.

[357] *Id.* Warren testified that at no time did Chisolm ask for an attorney or ask that the interrogation be stopped. *Id.* Warren also testified that no threats of violence or promises of leniency were offered to Chisolm. *Id.*

[358] *Id.*

[359] *Id.* at 635. However, Chisolm testified that he understood his rights and that he did sign a waiver of rights form. *Id.*

[360] *Id. See* Frost v. State, 483 So. 2d 1345, 1350 (Miss. 1986)(murder confession).

[361] 185 So. 2d 671 (Miss. 1966).

[362] *Chisolm*, 529 So. 2d at 634. *See also* Neal v. State, 451 So. 2d 743, 753 (Miss. 1984)(State has burden of proving voluntariness of a confession).

[363] *Chisolm*, 529 So. 2d at 634.

XIV. WITNESSES

Several decisions in the area of criminal law relating to witnesses were rendered by the Mississippi Supreme Court in 1988.[364] Two of these cases will be discussed textually, one discussing the rule of exclusion or sequestration, and the other analyzing the authority of the district attorney to grant immunity from prosecution.[365] In *Douglas v. State*,[366] the court construed Rule 615 of the Mississippi Rules of Evidence,[367] concerning the exclusion or sequestration of witnesses. In *Douglas*, the appellant, Tommie James Douglas was charged with the murder of Lesia Little, found guilty by a jury and sentenced to life imprisonment.[368] The appellant put on an expert witness, James Hall, who testified that Douglas could not have crawled into the broken bed-

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[364] Those not textually discussed are as follows: Harrison v. State, 534 So. 2d 175, 179 (Miss. 1988) (under Mississippi Rule of Evidence 607, voucher rule is repudiated and witness may be attacked by any party including party calling him); Smith v. State, 527 So. 2d 660, 664 (Miss. 1988) (although counsel had right to call witnesses in his behalf, it was not his right to force witness to testify to matters which might incriminate that witness); Ryan v. State, 525 So. 2d 799, 801 (Miss. 1988) (under Mississippi Rule of Evidence 601, six year-old child was competent to testify); Ivy v. State, 522 So. 2d 740, 742 (Miss. 1988) (under Mississippi Rule of Evidence 601, five year-old was competent to testify as witness as long as testimony is found by trial judge to be relevant under Rules 401 and 403); George v. State, 521 So. 2d 1287, 1289 (Miss. 1988) (use of contemporaneous notes, made by witness at time of incident, is highly desirable; photographs are analogous to notes and even more reliable); Holmes v. State, 537 So. 2d 882, 885 (Miss. 1988) (not cleared for publication) (failure of either party to examine witness equally accessible to both parties is not proper subject for comment before jury).

[365] These two cases are Douglas v. State, 525 So. 2d 1312 (Miss. 1988), discussing the sequestration rule, and Wright v. McAdory, 536 So. 2d 897 (Miss. 1988), analyzing the district attorney's authority to grant immunity from prosecution.

[366] 525 So. 2d 1312 (Miss. 1988).

[367] Mississippi Rule of Evidence 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an office or employee of a party who is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

MISS. R EVID 615.

[368] *Douglas*, 525 So. 2d at 1313. Lesia Little, the victim, was shot to death in her home in Shuqualak, Mississippi. *Id.* The factual issue at trial was which one of two men, the appellant Tommie Douglas, Little's ex-live-in-partner and father of her children, or Eric Grady, her current boyfriend, actually shot her. *Id.* This factual question depended to a great extent on the fact of whether the appellant broke a bedroom window pane while entering the house, thereby corroborating Grady's story, or whether the window pane was broken by the appellant and Grady while fighting, thereby corroborating the appellant's story that Grady shot Little. *Id.*

room window of Little's house without being seriously cut, thereby corroborating Douglas' story that Little was shot by another visitor on the night of the incident, Eric Grady.[369] The Sheriff of Noxubee County, Cecil Russell, who had been present in the courtroom throughout all of the testimony, was called in rebuttal to testify about the window.[370] The appellant raised an objection to the testimony because the sheriff had been in the courtroom.[371] The trial judge overruled the motion, reasoning that the sheriff was allowed to remain in the courtroom at all times, even though the sequestration rule had been invoked by both parties before the trial proceedings began.[372] The sheriff then offered rebuttal testimony about the key factual issue in the trial — whether the broken window was up or down when he investigated the crime scene.[373] On appeal, Douglas alleged that the trial court erred in allowing the sheriff's testimony in violation of the sequestration rule.[374] In analyzing this issue, the Mississippi Supreme Court began by noting that in pre-rules cases it was generally held that it was within the trial court's discretion to allow a witness to testify in rebuttal even though he had been in the courtroom after the sequestration rule had been invoked.[375] The court then stated that under the new Rule 615, judicial discretion is more limited since sequestration is a matter of right except for the three categories of witnesses set forth in the rule.[376] The

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[369] *Id.*

[370] *Id.* at 1315.

[371] *Id.* The appellant claimed this was a violation of the sequestration rule. *Id.*

[372] *Id.*

[373] *Id.* at 1316. The sheriff had not testified during the State's case-in-chief, nor had he offered this particular information to the district attorney until the defense witnesses had testified. *Id.* The sheriff testified that he told the district attorney immediately before his testimony that the window was up when he went back to investigate the house the morning after the incident. *Id.* He claimed that he took his knife and stuck it in the wood frame of the window and pulled it down in order to see if there were any fingerprints or blood on the broken glass. *Id.* at 1315-16.

[374] *Id.* at 1315.

[375] *Id.* at 1316; *see, e.g.*, Hollins v. State, 340 So. 2d 438, 441 (Miss. 1976) (allowing witness to remain in courtroom is within the discretion of trial judge); Butler v. State, 320 So. 2d 786, 788 (Miss. 1975) (sequestration of witnesses is procedural matter and within sound discretion of trial judge). This same principle is applicable to law enforcement personnel specifically. *See* Bell v. State, 443 So. 2d 16, 21 (Miss. 1983) (sequestration discretionary although better practice is to exclude officer, if another officer available for security); Ethridge v. State, 418 So. 2d 798, 800 (Miss. 1982) (witness exclusion discretionary although sheriff's testimony related only to evidence identification and chain of custody); Gaines v. State, 404 So. 2d 557, 562 (Miss. 1981) (sequestration of rebuttal witnesses within trial court's discretion even though sheriff voluntarily removed himself from courtroom during testimony of witnesses).

[376] *Douglas*, 525 So. 2d at 1316. *See supra* note 4 (persons excepted from sequestra-

court then held that it was error for the trial court to allow the sheriff to testify.[377] The court found that the sheriff was not exempted from the rule simply by virtue of his office, unless under category (2) of the rule's exceptions, the sheriff was designated by the district attorney as the State's representative because his presence was necessary to assist the prosecution at trial.[378] The court then outlined the remedies available for violation of the rule as (a) citing the witness for contempt, (b) allowing "full-bore" cross-examination, or (c) striking the testimony only where a party has suffered actual prejudice or when there has been fraud by the witness or counsel.[379] In the instant case, the court found no prejudice since the defense attorney had questioned the sheriff extensively about his testimony.[380] Thus, the court found that the issue of the sheriff's credibility was squarely before the jury, making Douglas' assignment of error without merit.[381]

In *Wright v. McAdory*,[382] the court analyzed the extent to which the district attorney is authorized to grant a witness immunity from prosecution in exchange for the witness' appearance before the grand jury, and whether a person with immunity from prosecution may be subpoenaed and compelled to testify before a grand jury.[383] In *Wright*, the appellant, John Wright, was present at the time of a shooting at Jackson State University.[384] Wright was then subpoenaed to appear before the grand jury which was convened to consider the matter.[385] While before the grand jury, the appellant was told he was not a suspect in the shooting, and, even if he said anything in testimony that might incriminate him, he would enjoy immunity from prosecution.[386]

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tion are: (1) party who is natural person; (2) officer or employee of non-person designated as its representative; and (3) person essential to presentation of cause).

[377] *Douglas*, 525 So. 2d at 1316.

[378] *Id.* at 1317.

[378] *Id. See also* United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir. 1983) (outlining remedies available for violation of rule).

[380] *Douglas*, 525 So. 2d at 1318.

[381] *Id.* The court then addressed the remaining assignments of error raised by Douglas, found them to be without merit, and affirmed the appellant's conviction and sentence. *Id.*

[382] 536 So. 2d 897 (Miss. 1988).

[383] Another case dealing with plea agreements rendered by the Mississippi Supreme Court and not textually discussed was: Doctor v. State, 522 So. 2d 229, 230 (Miss. 1988) (if guilty plea was involuntary, as induced by a promise of earned time, court had no choice but to set aside guilty plea for retrial).

[384] *Wright*, 536 So. 2d at 899. The prime suspect in this shooting was Chauncey Wright, the brother of the appellant. *Id.*

[385] *Id.*

[386] *Id.*

Notwithstanding this immunity offer, Wright refused to testify, invoking his fifth amendment privilege against self-incrimination.[387] The Circuit Court of Hinds County held Wright in contempt and committed him to the custody of the Sheriff of Hinds County.[388] Wright then filed a Petition for Writ of Habeas Corpus with the Mississippi Supreme Court, challenging the legality of the contempt order.[389] In addressing this issue, the court began by noting that in the past it had expressed considerable doubt that the district attorney had the authority to grant a witness immunity from prosecution in exchange for testimony.[390] The court then set forth a fundamental premise that the district attorney has the authority to make an agreement with an individual the terms of which are, in substance, that the State agrees that the individual will not be prosecuted and that the individual will testify in subsequent judicial proceedings.[391] The court then stated that where that immunity agreement is submitted to and approved by the court, there can be no doubt of its validity and enforceability.[392] In addition, the court stated that present federal law holds that federal authorities are obligated to honor grants of immunity by the states.[393]

In addressing the second issue, the court found that since an individual may not involuntarily be stripped of his privilege against self-incrimination, he may not be compelled to testify before the grand jury unless the grant of immunity offered is coextensive with the protection he enjoys under the United States Constitution.[394] Any grant of immunity which affords the individual less protection than otherwise availa-

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[387] *Id.* The individual enjoys a right against self-incrimination by virtue of the fifth amendment to the Constitution of the United States, made enforceable against the States by the fourteenth amendment (Malloy v. Hogan, 378 U.S. 1, 6-11 (1964)) and art. III, sect. 26 of the Mississippi Constitution. *Wright*, 536 So. 2d at 899 n.1.

[388] *Wright*, 536 So. 2d at 899.

[389] *Id.* at 900. The supreme court ordered that Wright be released on bond pending consideration of his petition. *Id.*

[390] *Id.* at 901. *See, e.g.*, Smith v. State, 492 So. 2d 260, 268 (Miss. 1986) (no authority in state that requires or gives court authority to grant immunity in exchange for testimony); Hubbard v. McKey, 193 So. 2d 129, 131 (Miss. 1966) (no statute, constitutional provision, or law authorizing court to grant immunity in such cases).

[391] *Wright*, 536 So. 2d at 902.

[392] *Id. See also* MISS. CODE ANN. § 99-15-53 (1972) (district attorney shall not compromise cause without consent of court).

[393] *Wright*, 536 So. 2d at 903. *See* Kastigar v. United States, 406 U.S. 441, 456-57 (1972) (privilege protects State witnesses against incrimination under federal as well as state law); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (State witness cannot be compelled to give testimony which may be incriminating under federal law.)

[394] *Wright*, 536 So. 2d at 903.

ble to him by federal law is by definition inadequate.[395] In the instant case, the court found that before the prosecution can place an individual such as John Wright in a position where he had no right to refuse to testify and to subject him to contempt if he refused, it is required to grant him immunity from prosecution for his involvement with the matter of which he is testifying before the grand jury and for any transaction, matter, or thing concerning that which he may testify or produce evidence.[396] This extensive immunity requirement construes article 3, section 26 of the Mississippi Constitution to require a "transactional" immunity grant, i.e., any transaction about which the witness might testify.[397] Since the immunity agreement offered to Wright was inadequate in several aspects, the court granted the appellant's writ of habeas corpus and ordered him released from custody.[398]

XV. Plea Bargain Agreements

In 1988, the Mississippi Supreme Court also addressed the issue of the enforceability of plea bargain agreements. In *Danley v. State*,[399] the appellant, Bernard Douglas Danley, was found guilty of murder and sentenced to life imprisonment.[400] After Danley was arrested, the

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[395] *Id.*

[396] *Id.* Moreover, this testimony or evidence may not be used against the witness in any criminal prosecution, except perjury. *Id.*

[397] *Id.* at 903-04. This transactional immunity construction stands as an independent State ground for decision by Michigan v. Long, 436 U.S. 1032, 1037-44 (1983). *Wright*, 536 So. 2d at 904 n.4.

[398] *Wright*, 536 So. 2d at 905. The immunity agreement was inadequate because it limited Wright's immunity to his involvement in the shooting incident, thereby falling short of the definition of transactional immunity; the immunity grant did not fully advise the witness that he is at all times subject to prosecution for perjury under MISS. CODE ANN. § 97-9-59 (1972); the immunity agreement stated that it was not binding on other local, state, and federal authorities; and the grant did not extend Wright complete transactional immunity with the sole and limited exception that he may be prosecuted for perjury. *Wright*, 536 So. 2d at 904.

[399] No. 58,161 (Miss. Dec. 28, 1988) (not released for publication).

[400] *Danley*, slip op. at 1. Danley was convicted for the murder of William Platt (also known as "Fuzzy" or "Buddy"), who was stabbed to death. *Id.* slip op. at 2. The appellant and Platt were co-workers at the International Paper Company in Moss Point, Mississippi. *Id.* The two first became acquainted when Platt, according to Danley, approached him about the idea of selling marijuana. *Id.* On the evening of the incident, a meeting had been arranged between Danley and Platt, the purpose of which was for Danley to pay Platt for a pound of marijuana. *Id.* Danley claimed that Platt was stabbed by Marlo Reid, who was also present at the meeting between Danley and Platt. *Id.* Reid maintained that Danley and Platt were engaged in a drug transaction when Platt yelled. *Id.* at 2-3. Reid became fearful and ran off into the woods. *Id.* Reid subsequently hitch-

district attorney and the appellant had entered into a memorandum of immunity (immunity agreement).[401] Under the provisions of this agreement, Danley was to direct law enforcement officials to the body of the victim, William Platt, and assist them in locating the person(s) who murdered him.[402] In exchange for the appellant's full and truthful cooperation, the State and the district attorney were to recommend to the trial court that Danley be tried as an accessory after the fact of murder and as a conspirator to distribute a controlled substance.[403] Upon entry of the appellant's guilty plea, the State promised to recommend a sentence of five years on the accessory charge and five to ten years on the controlled substance charge and that Danley serve his sentence in a Department of Corrections work center or county jail near Lucedale.[404] After the agreement had been entered into, the district attorney felt that Danley had lied about certain details of the evening of the incident.[405] As a consequence, the district attorney decided that the agreement should be terminated, and the decision was then made to prosecute Danley for Platt's murder.[406] Danley challenged this decision by the district attorney as a violation of the terms of the agreement.[407] The issue before the Mississippi Supreme Court was whether the district attorney had the unilateral authority to make the decision to terminate the immunity agreement.[408] The court first began its analysis of this issue by stating that the memorandum of understanding, although unorthodox, was a plea bargain.[409] The court next found that the prosecution had failed to honor the defendant's rights scrupulously.[410] First, the court found no indication that the district

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hiked back to Alabama. *Id.*

[401] *Id.* at 4.

[402] *Id.*

[403] *Id.*

[404] *Id.* at 5.

[405] *Id.* The reason given by the district attorney was that Danley had lied about certain key information, specifically whether he had taken anything from Platt's vehicle. *Id.*

[406] *Id.*

[407] *Id.* Danley claimed that the district attorney never intended to keep the promises made in the immunity agreement was made was to unable law enforcement officials to discover Platt's body. *Id.* at 5-6.

[408] *Id.* at 6-7.

[409] *Id.* The United States Supreme Court held that the process of plea bargaining is to be encouraged if properly and fairly administered. Santobello v. New York, 404 U.S. 257, 260 (1971).

[410] *Danley*, slip op. at 7. The prosecution is held to "the most meticulous standards of both promise and performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir. 1973).

attorney had ever sought approval of the trial court before reaching the plea agreement with Danley and, more seriously, never asked approval of the court before unilaterally rescinding the agreement.[411] The court ruled that the question of whether the defendant had failed to perform the condition precedent to the enforceability of the plea agreement must be determined by the court and only on the basis of adequate evidence.[412] The court then emphasized the importance of upholding plea bargain agreements when the defendant has relied on them to his detriment.[413] In the instant case, the court found elements of detrimental reliance and remanded the case so that the State would be required to honor the terms of the plea bargain agreement.[414]

XVI. MISCELLANEOUS

Several cases dealing with miscellaneous issues were presented to the Mississippi Supreme Court.[415] The supreme court also decided several issues related to the rights of the accused in 1988.[416] Two such

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[411] *Danley*, slip op. at 7-8.

[412] *Id.* at 8. The court cited numerous decisions which approved this holding. *Id. See, e.g.*, United States v. Donahey, 529 F.2d 831, 832 (5th Cir. 1976) (court had ample basis for concluding that appellant had failed to live up to her part of plea bargain agreement); Kresler v. State, 462 So. 2d 785, 788 (Ala. Cr. App. 1984) (question before court is whether defendant performed his obligation in plea bargain); Brown v. State, 607 S.W. 2d 801, 804 (Mo. App. 1980) (court's decision as to whether defendant fulfilled his part of plea bargain agreement).

[413] *Danley*, slip op. at 9. *See, e.g.*, Edwards v. State, 465 So. 2d 1085, 1086 (Miss. 1985) (in light of appellant's detrimental reliance on agreement, State should be made to comply with obligations under agreement).

[414] *Danley*, slip op. at 9-10.

[415] Those cases not discussed textually are Brown v. State, 533 So. 2d 1118, 1122 (Miss. 1988) (although MISS. CODE ANN. § 99-15-26 (2)(d) does not use specific word "probation" it nevertheless authorizes court to place defendant on probation); Yarbrough v. State, 528 So. 2d 1130, 1130 (Miss. 1988) (issue of insanity for jury to determine); State v. Europa Cruise Line, Ltd., 528 So. 2d 839, 840 (Miss. 1988) (motion to dissolve preliminary injunction not final order, thus, interlocutory appeal not proper); Boyd v. State, 523 So. 2d 1037, 1040 (Miss. 1988) (if photographs are relevant, mere fact they are unpleasant or gruesome is not bar to admission into evidence); McKinney v. State, 521 So. 2d 898, 899 (Miss. 1988) (conviction of rape may be upheld with uncorroborated testimony of victim); Roberts v. State, 519 So. 2d 896, 896 (Miss. 1988) (assignments of error without merit and appeal raises no issue requiring discussion).

[416] Those cases not discussed textually include Estes v. State, 533 So. 2d 437, 441 (Miss. 1988) (person cannot complain of illegal search of third party's premises since his fourth amendment rights are not infringed); Bostic v. State, 531 So. 2d 1210, 1213-14 (Miss. 1988) (where defendant was aware that his disruptive behavior was reason for his first removal and that continued disruption would result in second removal, such occurrences amounted to warning that he would be removed from courtroom); Hood v. State,

decisions warranting textual discussion deal with the right to a public trial and the right to counsel for voice line-ups.[417] In *Lee v. State*,[418] James E. Lee was found guilty of rape and sentenced to forty years imprisonment.[419] At his trial, the State moved that the public be excluded from the courtroom during the victim's testimony.[420] The appellant objected to the exclusion on the basis of his sixth amendment right to a public trial.[421] An informal hearing was held in the judge's chambers, whereupon the court sustained the State's motion to exclude the public.[422] On appeal, Lee continued to maintain that the lower court's action violated his right to a public trial.[423] In analyzing this issue, the Mississippi Supreme Court first recognized a conflict between article 3, section 26 of the Mississippi Constitution, which authorizes the exclusion of the public when the prosecution is for rape, and the sixth amendment to the United States Constitution, which contains no exclusion of the public for any purpose.[424] The court then

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523 So. 2d 302, 309-10 (Miss. 1988) (introduction of judge's opinion and testimony of attorneys in prior case amounts to improper influence on grand jury); West v. State, 519 So. 2d 418, 423 (Miss. 1988) (error for judge to improperly interject himself into proceedings before court since jurors are very susceptible to judge's influence); Pinson v. State, 518 So. 2d 1220, 1222 (Miss. 1988) (granting of continuance within sound discretion of trial judge); Avery v. State, No. 58,022 (Miss. Nov. 2, 1988) (not released for publication) (right to confrontation is not constitutionally required prior to trial on indictment).

[417] These two cases are Lee v. State, 529 So. 2d 181 (Miss. 1988), dealing with the right to a public trial, and Nicholson v. State, 523 So. 2d 68 (Miss. 1988), addressing the issue of the right to counsel for voice lineups.

[418] 529 So. 2d 181 (Miss. 1988).

[419] *Lee*, 529 So. 2d at 181. The victim, Ann, met Lee through friends and began dating him for several weeks. *Id.* In one such date, Lee and Ann went for a ride in his automobile. *Id.* Eventually, the couple made their way to a piece of property on which Lee intended to put his house trailer. *Id.* Ann testified that while on the property Lee forcibly raped her. *Id.* He then returned to her home. *Id.* at 181-82.

[420] *Id.* at 182. The basis for this exclusion request was that the victim was extremely sensitive. *Id.* The district attorney also cited art. III, section 26 of the Mississippi Constitution of 1890 which provides for the exclusion of the public from prosecutions for rape, adultery, fornication, sodomy, or crimes against nature, in the court's discretion. *Id.*

[421] *Id.*

[422] *Id.* The reasons articulated by the judge for the exclusion were: "Ann was a virgin at the time of the rape; Ann was an extremely religious and sheltered young girl who was extremely sensitive; Ann's feelings of humiliation and her anticipation of public scrutiny had influenced her to drop the case at one point; Ann had great difficulty in expressing herself and Ann refused to say the words 'penis' and 'vagina' in front of the public present in the courtroom." *Id.*

[423] *Id.*

[424] *Id.* The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

noted that numerous federal courts have recognized that the sixth amendment right to a public trial in a criminal case may be limited by exclusion of spectators to the extent necessary to avoid the embarrassment or emotional disturbance of a witness giving testimony in a particular case.[425] Since the trial judge had held an evidentiary hearing, made findings sufficient for exclusion, and never excluded court officials, the appellant, legal counsel, or the jury, the court in the instant case held that there was no violation of the sixth amendment.[426]

In *Nicholson v. State*,[427] the court addressed the issue of whether a voice line-up is equivalent to a corporal line-up and thus requires the protection of the right to counsel. In *Nicholson*, the appellant, James Harvey Nicholson, was convicted of rape and sentenced to thirty years imprisonment.[428] Subsequent to her attack, the victim, Sandra McKinion, was in the police station for further questioning.[429] As she walked into the station, the victim overheard Nicholson's voice and immediately identified the voice as that of her assailant.[430] Nicholson claimed that his sixth amendment right to counsel was violated by this "show-up."[431] In addressing this question, the court held that Nicholson's right to counsel was not violated in the absence of any evidence of staging, even assuming that a "voice overhearing" was equivalent to a

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shall have been committed, which district shall have been previously ascertained by law, and to be enforced of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[425] *Id. See, e.g.*, United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 695 (7th Cir. 1971)(court closed to public hearing testimony of twenty-one year-old rape victim), *cert. denied* 434 U.S. 1076 (1978); Douglas v. State, 328 So. 2d 18, 20-21 (Fla.) (court closed to general public during rape victim's testimony), *cert. denied* 429 U.S. 871 (1976).

[426] *Lee*, 529 So. 2d at 183.

[427] 523 So. 2d 68 (Miss. 1988).

[428] *Nicholson*, 523 So. 2d at 70. Sandra McKinion was awakened during the early morning hours of August 30, 1985, to find someone standing over her with a knife to her head. *Id.* The man forced her to take her clothes off and then raped her. *Id.* McKinion was able to discern, on the body of her attacker, a tattoo on his right arm, a scar on his rib cage, and that he was a black man with short hair, a light beard, and a little mustache. *Id.*

[429] *Id.* at 73.

[430] *Id.* One police officer testified that he knew Nicholson was in the station that night, but that such knowledge did not prompt him to bring McKinion into the station nor did he know that Nicholson would still be in the station when he returned with McKinion. *Id.* He also testified that he did not tell McKinion that Nicholson was in the station. *Id.*

[431] *Id.*

"show-up."[432] Nicholson also argued that a voice "line-up" held at the police station was a violation of his right to counsel.[433] The court analogized a corporeal line-up to a voice line-up and found that this kind of voice line-up closely resembled the trial-like confrontation of a corporal line-up, thus amounting to a critical stage for which counsel should be present.[434] In addressing the issue of whether Nicholson's right to counsel had attached, the court stated that if the voice line-up was conducted before Nicholson was arrested pursuant to a warrant then his right to counsel claim was without merit; but if Nicholson was arrested at the time of the line-up, his right to counsel had attached.[435] If the voice line-up was conducted in violation of his right to counsel, then testimony about the voice identification would then be inadmissible.[436] In the instant case, the court found the record unclear as to whether Nicholson was under arrest at the time of the voice line-up but held that, even if the line-up was conducted in violation of the appellant's right to counsel, the use of the voice line-up identification testimony at trial was harmless constitutional error since the voice line-up was not the first confrontation between the victim and the appellant.[437] The court also noted that even if the voice line-up had been conducted in violation of Nicholson's right to counsel, the in-court identification would have still been permitted upon a showing by clear and convincing evidence that the identification was based in observations of the suspect other than that of the line-up identification.[438] Thus, in the instant case, the court held there was clear and convincing evidence that the victim made her in-court identification of Nicholson based on her intimate observations of the accused on the night of the crime, not on the voice line-up, and affirmed Nicholson's conviction

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[432] *Id.* The Mississippi Supreme Court held in Thompson v. State, 483 So. 2d 690 (Miss. 1986) that there is no violation of the right to counsel where the encounter was inadvertent and not staged. *Thompson*, 483 So. 2d at 692.

[433] *Nicholson*, 523 So. 2d at 73.

[434] *Id.* at 73-74.

[435] *Id.* at 74.

[436] *Id.*

[437] *Id.* The court stated that, under Moore v. Illinois, 434 U.S. 220 (1977) and Gilbert v. California, 388 U.S. 263 (1966), it would have to determine beyond a reasonable doubt that the admission of the testimony in the instant case constituted harmless constitutional error under Chapman v. California, 386 U.S. 18 (1967). *Nicholson*, 523 So. 2d at 74. Thus, the court stated that, had the voice lineup been the first confrontation and in violation of Nicholson's right to counsel, testimony of any subsequent pre-trial identification would also have been inadmissible because of the possibility of exploitation of the initial illegality. *Nicholson*, 523 So. 2d at 74.

[438] *Id.* at 75.

and sentence.[439]

In the concurring opinion, Justice Robertson found that Nicholson's right to counsel had attached prior to the time of the voice line-up in which he was identified by the victim.[440] Although Justice Robertson found the line-up to be in violation of Nicholson's right to counsel, he found that a reversal of the conviction was not required since the victim had subsequently identified the appellant in the courtroom.[441]

Three other cases, one dealing with the guidelines for imposing a death sentence, another with juror note-taking, and the last with an indictment alleging offenses against a municipality, will be discussed textually.[442] In *White v. State*,[443] the court discussed section 99-19-101 (7) of the Mississippi Code which sets forth the guidelines for imposing the death sentence. In *White*, the appellant, Willie Lee White, was convicted of the capital murder of Annie Dale Lewis and sentenced to death.[444] White alleged that the evidence presented was legally insufficient to support the sentence of death imposed upon him.[445] In addressing this issue, the Mississippi Supreme Court looked to the guidelines set forth in section 99-19-101(7) of the Mississippi Code which requires a finding by the jury of one or more of the following elements: that the defendant actually killed, intended to kill, or contemplated that lethal force would be employed.[446] The court held that juries,

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[439] *Id.*

[440] *Id.* at 76. Justice Robertson stated that Nicholson had been in police custody at least forty consecutive hours prior to the voice line-up. *Id.* Thus, since his freedom of movement was effectively restricted he was in custody and should have promptly been offered counsel. *Id.*

[441] *Id.* at 77.

[442] These cases are White v. State, 532 So. 2d 1207 (Miss. 1988), dealing with the guidelines for imposing a death sentence under MISS. CODE ANN. 99-9-101 (7); Wash v. State, 521 So.2d 890 (Miss. 1988), dealing with the taking of notes by the jurors; and Sartain v. City of Water Valley, 528 So. 2d 1125 (Miss. 1988), discussing an indictment alleging offenses against the municipality.

[443] 532 So. 2d 1207 (Miss. 1988).

[444] *White*, 532 So. 2d at 1209. Lewis, the owner of Poo-Nannie's in Grenada, Mississippi, had been shot during a robbery and died three days later from the bullet wound. *Id.* White was identified as one of the two persons seen fleeing the crime scene. *Id.*

[445] *Id.* at 1219.

[446] *Id.* The court stated that these findings may be based only on credible evidence. *Id.* Section 99-19-101 (7) was enacted in 1983 in response to Enmund v. Florida, 458 U.S. 782 (1982). *Id.* The court stated that, with this statutory enactment, the legislature had established two unyielding requirements: (1) that the state shoulder a definite and stringent burden to show (2) specific and credible evidence establishing at least one of the prongs described in *Enmund* and now embodied in Section 99-19-101 (7). *White*, 532 So.

when imposing sentences, must be instructed that the findings under subsection (7) must be beyond a reasonable doubt.[447] In the instant case, the court noted that the proper instruction was given but then reviewed the evidence to determine whether it was legally sufficient for the imposition of the death sentence.[448] Using this analysis, the court held that the evidence was legally insufficient to establish beyond a reasonable doubt that White killed or attempted to kill.[449] As to the other two statutory elements, the court found that, although the evidence was sufficient for a capital murder conviction, the evidence offered no indication that the appellant was the killer or that there was any contemplation of the use of lethal force.[450] Thus, the court affirmed White's murder conviction and reversed and rendered the penalty sentence.[451]

In a dissent to the majority's sentencing opinion, Justice Griffin, citing *Emmund v. Florida*[452] and its progeny, stated that federal courts have upheld the death penalty where an accomplice had committed the murder, while the majority in the instant case refused to impose such a penalty on the appellant although it was clearly established that he had robbed his victim with a gun.[453] Justice Griffin also strongly disagreed with the majority's contention that the element of proof set forth in *Emmund* varied from that established by precedent for section 99-19-101 (7) of the Mississippi Code.[454]

In *Wash v. State*,[455] the Mississippi Supreme Court addressed the issue of whether jurors should be allowed to take notes of the testimony during a trial. In *Wash*, the appellant, Joe Milton Wash, was convicted by a jury of armed robbery and sentenced to thirty years imprisonment.[456] Subsequent to the return of the verdict, it was dis-

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2d at 1219.

[447] *Id.* The court stated that although subsection (7) does not identify the minimum amount of proof necessary to establish one or more of the findings, there are numerous analogous situations which do require proof beyond a reasonable doubt. *Id.*

[448] *Id.* at 1220.

[449] *Id.*

[450] *Id.* at 1221.

[451] *Id.* at 1222.

[452] 458 U.S. 782 (1982).

[453] *White*, 532 So. 2d at 1227-29.

[454] *Id.* at 1231. Justice Griffin set forth a line of cases reflecting the fact that the Mississippi Supreme Court had specifically adopted the constitutional standard enunciated in *Emmund*. *Id.*

[455] 521 So. 2d 890 (Miss. 1988).

[456] *Wash*, 521 So. 2d at 891. The mobile home of Wilson Blaylock was robbed by two men, one of whom was identified by Blaylock as the appellant, Wash. *Id.* at 892.

covered that one of the jurors had taken notes during the trial.[457] Wash moved for a new trial and the trial judge held a hearing on the matter.[458] Since the juror in question testified that no one else saw the notes and that she did not refer to them again or read from them during the jury's deliberations, the trial judge found the appellant had suffered no prejudice and overruled his motion for a new trial.[459] On appeal, Wash argued that the use of the notes may have skewed the jury's interpretation of the facts to the perspective of the juror who took notes.[460] Although the issue before the court was not whether jurors should be permitted to take notes but whether a new trial was warranted by the facts of the instant case,[461] the supreme court held that juror note-taking should be left to the sound discretion of the trial judge to permit in cases where he deems it desirable or necessary in complicated matters or where both parties agree that jurors may take notes.[462] The court also recommended that when jurors are allowed to take notes the trial judge should give directions and set limitations on the use of these notes.[463] The court held that since the trial judge had been required to hold a *post hoc* ruling on the issue he had not abused his discretion in not granting a new trial.[464]

In *Sartain v. City of Water Valley*,[465] the Mississippi Supreme Court addressed the question of whether an affidavit charging an offense in the name of the municipality should have been brought in the name of the State of Mississippi. In *Sartain*, the appellant, Josephine Sartain, was convicted of disturbing the peace and sentenced to five months imprisonment and a fine of $483.00.[466] The affidavit charging the appellant was brought in the name of the City of Water Valley. Sartain alleged that it was insufficient in law because it did not reflect

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[457] *Id.* at 897. The juror taking notes was not observed by either the prosecutor or the defense counsel until the verdict was returned. *Id.* The court clerk discovered the notes when the jury returned to deliver the verdict. *Id.*

[458] *Id.* The juror testified that she worked with the Social Security Administration and was trained to take notes as to pertinent and discrepant evidence. She did take the notes into the jury room and condensed them onto a second sheet of paper in the jury room but allowed no one else to see them. *Id.*

[459] *Id.*

[460] *Id.*

[461] *Id.* The trial judge had made a *post hoc* ruling on the issue of juror note-taking since the notes were not discovered until after the verdict was delivered. *Id.*

[462] *Id.*

[463] *Id.*

[464] *Id.*

[465] 528 So. 2d 1125 (Miss. 1988).

[466] *Sartain*, 528 So. 2d at 1125.

a prosecution in the name of the State of Mississippi or charge an offense against the peace and dignity of the State.[467] In addressing this issue, the supreme court noted that state law empowers municipal courts to hear and determine all violations of municipal ordinances and state misdemeanors made offenses against municipalities; thus authorizing the City of Water Valley to declare as offenses against the municipality, conduct declared unlawful as misdemeanors under the laws of the state.[468] Sartain based her contention on article VI, section 169 of the Mississippi Constitution which mandates that "all prosecutions shall be carried on in the name and by authority of the 'State of Mississippi,' and all indictments shall conclude 'against the peace and dignity of the state.' "[469] The court held that section 169, as a matter of common sense, did not and should not apply literally to prosecutions for violations of municipal ordinances in municipal courts.[470] In the instant case, the court stated that the prosecution neither in fact nor in law had been brought by the State of Mississippi, but by the City of Water Valley and to say otherwise would be highly misleading.[471] Since the affidavit reflected a public prosecution within the authority of the City of Water Valley, the court found it to be in conformity with present case law and affirmed Sartain's conviction.[472]

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[467] *Id.*

[468] *See* MISS. CODE ANN. § 21-23-7(1) (Supp. 1987)(jurisdiction of municipal courts); MISS. CODE ANN. § 21-13-19 (1972) (municipality has authority to declare unlawful conduct which is misdemeanor under state law).

[469] MISS. CONST. art. VI, § 169 (1890).

[470] *Sartain*, 528 So. 2d at 1126.

[471] *Id.*

[472] *Id.* at 1127. Although the court found Sartain's prosecution to be lawful, it vacated her fine since it clearly exceeded that authorized by the city ordinance. *Id.*

Other miscellaneous cases were decided in the areas of indictments,[473] objections,[474] bonds,[475] and parole eligibility.[476]

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Tracy Oakley
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[473] Cases relating to indictments include the following: Brown v. State, 534 So. 2d 1019, 1022-23 (Miss. 1988) (there is no error in multi-count indictment when crimes have same elements of proof and arise from same transactions and occurrences); Woodward v. State, 533 So. 2d 418, 422 (Miss. 1988) (no objection may be validly raised to multi-count indictment if dictates of MISS. CODE ANN. § 99-7-2 (Supp. 1987) are followed); Doby v. State, 532 So. 2d 584, 586-87 (Miss. 1988) (test of prejudice in amendment of indictment is whether defense available under original indictment is equally available under amended indictment); Gardner v. State, 531 So. 2d 805, 808 (Miss. 1988) (where indictment includes statutory sections under which appellant was indicted and clear and concise statement of crime charged, crime is properly charged); Alexander v. State, 520 So. 2d 127, 129 (Miss. 1988) (where indictment charges lewd suggestion combined with physical act, overt act was suitable for ultimate commission of crime).

[474] *See* Moawad v. State, 531 So. 2d 632, 635 (Miss. 1988) (failure to make contemporaneous objection at trial constitutes waiver of any error subsequently assigned); Smith v. State, 530 So. 2d 155, 160 (Miss. 1988) (appellant waived error by failure to object at earliest opportunity, together with use of evidence in his own case-in-chief and during closing argument); Crenshaw v. State, 520 So. 2d 131, 134 (Miss. 1988) (where trial court sustains objection and directs jury to disregard statement, it is presumed that jurors follow instruction of court so as dissipate any prejudicial effect); Singleton v. State, 518 So. 2d 653, 655 (Miss. 1988) (contemporaneous objection necessary to preserve right to raise error on appeal).

[475] *See* Dixon v. State, 528 So. 2d 832, 832-33 (Miss. 1988) (where bond, though imperfect, was filed and approved by justice court judge, circuit court should have granted appellant's request for hearing and opportunity to correct any deficiencies); Lambert v. State, 524 So. 2d 576, 578 (Miss. 1988) (when appellant agreed to, and executed with sureties, recognizance bond, he effectively waived right to preliminary hearing); Sides v. State, 519 So. 2d 1222, 1223-24 (Miss. 1988) (MISS. CODE ANN. § 83-39-7 (1972) provides that bondsman may petition court for refund of money forfeited on final judgment or may petition for stay and remission of forfeiture where there is proof of defendant's incarceration within another jurisdiction).

[476] *See* McFadden v. State, 523 So. 2d 77, 78 (Miss. 1988) (where appellant became eligible for earned time after attorney general's opinion that such time cannot be used to reduce sentence to less than ten years, he has no claim of entitlement to reduction of his parole eligibility date); Voyles v. State, 520 So. 2d 501, 502-03 (Miss. 1988) (full earned time credit must be given appellant, if deserved, for time be was incarcerated illegally as ineligible Class IV offender).

MISCELLANEOUS

I. Family Law

In 1988, the Mississippi Supreme Court rendered decisions in the area of family law regarding the issues of alimony,[1] child custody,[2] child support,[3] paternity,[4] separate maintenance,[5] defenses to an action for divorce including recrimination[6] and condonation or connivance,[7] as well as miscellaneous other issues.[8]

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[1] *See* Jones v. Jones, 532 So. 2d 574, 579-80 (Miss. 1988) (textually discussed); Geiger v. Geiger, 530 So. 2d 185, 187 (Miss. 1988) (where husband's motion to modify alimony is denied because of failure to show sufficient material change in circumstances to justify reduction, but where husband's motion nevertheless has some merit, then ex-wife is not entitled to attorney's fees); Hollman v. Hollman, 527 So. 2d 90,92 (Miss. 1988) (alimony award of $2,500 per month for ten years constitutes periodic alimony and, as such, terminates upon death of husband or remarriage of wife); Carpenter v. Carpenter, 519 So. 2d 891, 895 (Miss. 1988) (wife not entitled to alimony where her net worth exceeded that of husband).

[2] *See* Walters v. Walters, 519 So. 2d 427, 428 (Miss. 1988) (Uniform Child custody Jurisdiction Act determines subject matter jurisdiction in interstate custody battle).

[3] *See* Clark v. Myrick, 523 So. 2d 79, 82 (Miss. 1988) (there may be no modification of child support decree absent substantial change in circumstances of one of interested parties).

[4] *See* Deer v. Mississippi State Dept. of Pub. Welfare, 518 So. 2d 649, 653 (Miss. 1988) (where defendant in paternity suit makes timely request that parties submit to blood tests, then, where substantial doubt exists that defendant is father of child whose paternity is to be established, Miss. Code Ann. § 93-9-21 (Supp. 1987) requires that defendant's request be granted).

[5] *See* Williams v. Williams, 528 So. 2d 296, 298 (Miss. 1988) (monthly separate maintenance representing 96% of husband's monthly income held clearly excessive; $10,000 "lump sum" separate maintenance contrary to principle of separate maintenance); Thompson v. Thompson, 527 So. 2d 617, 623 (Miss. 1988) (chancery court may not order a division of marital assets after denying both parties divorce but granting wife separate maintenance).

[6] *See* Parker v. Parker, 519 So. 2d 1232, 1236 (Miss. 1988) (textually discussed).

[7] *See* Cheatham v. Cheatham, 537 So. 2d 435, 442 (Miss. 1988) (continued cohabitation with unfaithful marital partner while waiting for second indiscretion does not alone constitute condonation or connivance).

[8] *See* Traub v. Johnson, 536 So. 2d 25, 27 (Miss. 1988) (where prior agreement regarding property distribution between parties to divorce is not submitted to chancellor as part of property settlement, that agreement is unenforceable); *In re* Last Will & Test. of Cobert C. Blackwell, 531 So. 2d 1193, 1196 (Miss. 1988) (textually discussed); Mayoza v. Mayoza, 526 So. 2d 547, 550 (Miss. 1988) (where default judgment in divorce proceeding is entered against defendant for failure to appear, trial court's subsequent refusal to vacate judgment will not be overturned absent abuse of discretion); Estate of Hensley v.

A. Property Division

In *Jones v. Jones*[9] the trial court determined that Fred Jones had been guilty of habitual cruel and inhuman treatment, and, accordingly, awarded his wife Becky a divorce.[10] The lower court held that Becky contributed to Fred's acquisition of substantial real estate holdings.[11] The court then adjudicated that Fred and Becky were equal owners of the accumulated property.[12] In its final judgment, the lower court ordered an equal division of properties jointly accumulated by Fred and Becky despite the fact that the property was held in Fred's name alone.[13]

On appeal to the Mississippi Supreme Court, Fred contended that it was error for the chancery court to divest him of real property of which title was in his name exclusively.[14] The Mississippi Supreme Court held that the rule Fred sought to invoke no longer applies in Mississippi where one spouse has contributed his or her money or labor

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Estate of Hensley, 524 So. 2d 325, 327 (Miss. 1988) (as with any contract, antenuptial agreements must be construed in their entirety without giving undue weight to any individual portion); In re Conservatorship of Stallings, 523 So. 2d 49, 52 (Miss. 1988) (it is not necessary for ward to be non compos mentis in order for conservator to be appointed); In Interest of R.T., 520 So. 2d 136, 138 (Miss. 1988) (MISS. CODE ANN. § 43-21-455 (1972) requires that petitions alleging delinquency contain citation of statute or ordinance which child is alleged to have violated; however, failure to include citation will be fatal only if child is misled to his prejudice); In Interest of M.I., 519 So. 2d 433, 436 (Miss. 1988) (placement of minors in detention center subjects minor to jurisdiction of youth court which has authority to grant injunctive relief, cite persons for contempt); Prante v. Beggiani, 519 So. 2d 1208, 1213 (Miss. 1988) (Hinds County Chancery Court had jurisdiction to grant adoption of child despite continuing jurisdiction of Carroll County Youth Court over neglect of child case); Cooper v. Cooper, 518 So. 2d 664, 666 (Miss. 1988) (conversation of wife with IRS agent to effect that husband intended to have wife murdered insufficient to support chancellor's award of divorce on ground of habitual cruel and inhuman treatment); Methodist Hospital of Memphis v. Guardianship of Stephen G. March, 518 So. 2d 1227, 1228 (Miss. 1988) (mother had no legal authority, absent prior chancery court approval, to execute any document binding minor's estate insofar as insurance to which minor was entitled); Karenina By Vronsky v. Presley, 526 So. 2d 518, 525 (Miss. 1988) (unsuccessful adoption petitioner may be assessed attorney's fees).

[9] 532 So. 2d 574 (Miss. 1988).

[10] *Jones*, 532 So. 2d at 577. The Mississippi Supreme Court upheld the trial court's adjudication that Fred had been guilty of habitual cruel and inhuman treatment as well as the lower court's award of divorce to Becky. *Id.* at 578.

[11] *Id.* at 577.

[12] *Id.* at 578.

[13] *Id.*

[14] *Id.* at 578-79. Fred relied on the longstanding rule that the chancery court cannot divest a spouse of title to real property. *Id.* at 581.

toward the economic success of the marriage.[15] The court held that where a spouse has contributed cash or in kind services in working with his or her husband or wife, Mississippi law vests in the chancery court the authority to order an equitable division of the martial property, including title to real property.[16]

In a concurring opinion, Justice Prather maintained that the court should adopt a rule which would permit the chancery court to distribute property incident to divorce without regard to which spouse actually holds title to the property. Justice Prather advocated a rule which would permit the chancery court to consider a spouse's contributions, such as homemaking, to the marital relationship.[17]

B. Recrimination

In *Parker v. Parker*,[18] Mrs. Parker sued her husband for divorce on the ground of habitual cruel and inhuman treatment.[19] The chancery court found that Mr. Parker had been guilty of the martial offense as alleged;[20] however, the court denied the divorce, holding that the plaintiff had been guilty of adultery and that the defense of recrimination prohibited the granting of a divorce.[21] The Mississippi Supreme Court upheld the determination that Mr. Parker had been guilty of habitual cruel and inhuman treatment.[22] The court, however, reversed the lower court's holding that recrimination is a defense to an action for divorce in this case.[23] Citing section 93-5-3 of the Mississippi Code,[24] the court held that the Mississippi legislature "has, in the

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[15] *Id.* at 579. The court noted a series of cases which have eroded the rule relied on by appellant. In Clark v. Clark, 793 So. 2d 447 (Miss. 1974), the court held that a wife may be awarded either lump sum or periodic alimony of such a substantial nature that the award reflects her share in the jointly accumulated assets. *Clark*, 293 So. 2d at 449.

[16] *Jones*, 532 So. 2d at 581.

[17] *Id.* at 582. (Prather, J., concurring).

[18] 519 So. 2d 1232 (Miss. 1988).

[19] *Parker*, 519 So. 2d at 1233.

[20] *Id.* at 1234.

[21] *Id.* On appeal the Mississippi Supreme Court stated that the record reflects that the appellant did not commit adultery while the parties were living together, but only after the marital relationship had been destroyed. *Id.* at 1236.

[22] *Id.* at 1235.

[23] *Id.* at 1236.

[24] *Id.* at 1235. MISS. CODE ANN. § 93-5-3 provides that: If a complainant or cross-complainant in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor to deny such party a divorce, even though the evidence might establish recrimination on the part of such complainant or cross-complainant. MISS. CODE ANN. § 93-5-3 (1972).

least, greatly weakened the defense of recrimination."[25] The court also stated that the historical reasons justifying recrimination "are impractical and fail with the mores of the present times . . . ."[26] Thus, the court held that since the alleged recrimination occurred after the marriage had been destroyed, it was error for the chancellor to invoke the doctrine of recrimination and deny the plaintiff a divorce on the ground of habitual cruel and inhuman treatment.[27]

C. *Statutory Authority to Perform Rites of Matrimony*

In the case of *Matter of Last Will & Testament of Blackwell*,[28] the Mississippi Supreme Court upheld the lower court's determination of validity of the marriage of Cobert C. Blackwell and Nadine B. Fortenberry.[29] The marriage ceremony was performed by a "minister" of the California-based Universal Life Church.[30] The sole qualification of the minister to perform rites of matrimony consisted of a certificate obtained by mail from the Universal Life Church.[31] The court refused to "establish some hard-edged line of demarcation prescribing mini-

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[25] *Parker*, 519 So. 2d at 1236.

[26] *Id.* at 1236. Citing Moore, *An Examination of the Recrimination Doctrine*, 20 S.C.L. REV. 685 at 714-15 (1968), the court outlined four policy justifications which have been given for the doctrine:

> (a) by rendering divorces more difficult to procure, recrimination promotes marital stability.
>
> (b) The rule tends to deter immorality since a spouse is less likely to commit adultery (or any other marital offense) if he knows that his misdeed may prevent him from obtaining a divorce at some future time.
>
> (c) The doctrine serves to protect the wife's economic status.
>
> (d) Recrimination prevents persons who are obviously poor marriage risks from being freed to contract - and probably ruin -another marriage.

Parker, 529 So. 2d at 1235-36.

[27] *Parker*, 529 So. 2d at 1236.

[28] 531 So. 2d 1193 (Miss. 1988).

[29] *Blackwell*, 531 So. 2d at 1194. Cobert C. Blackwell and Nadine B. Fortenberry were married on November 19, 1984. *Id.* Blackwell died less than three months later. *Id.* Blackwell left a will in which he devised real property to his first wife, Margaret (who had predeceased him), for life, remainder to his brothers and sisters. *Id.* Nadine renounced the will and requested a widow's allowance. *Id.* Appellees, Blackwell's brothers and sisters, challenged Nadine's right to a widow's allowance, alleging that she and Blackwell were not lawfully married. *Id.*

[30] *Id.* MISS. CODE ANN. § 93-1-17 (1972) empowers "any . . . spiritual leader of any . . . religious body" to perform marriage ceremonies. MISS. CODE ANN. § 93-1-17 (1972).

[31] *Blackwell*, 531 So. 2d at 1196. The Universal Life Church required no prerequisites for obtaining its "Credentials of Ministry" *Id.* Appellees contended that the minister is not a "spiritual leader" and the Universal Life Church is not a "religious body" within the meaning of the statute. *Id.* at 1194.

mum qualifications for one authorized to soleminize rites of matrimony . . . ."[32] Accordingly, the court held that the minister is "enough of a 'spiritual leader', and the Universal Life Church is enough of a 'religious body' that, in the eyes of the law of this state, Cobert C. Blackwell and Nadine B. Fortenberry became husband and wife. . . ."[33]

II. Wills and Estates

In 1988, the Mississippi Supreme Court rendered a number of decisions concerning wills and the administration of estates. Several of these decisions are significant in that they clarify the position of the court in several traditionally controversial areas, the most important of which is the doctrine of undue influence and confidential relationships. Four decisions of the court represent important developments in the law of undue influence and will be discussed in detail; however, the court also dealt with issues arising in the areas of illegitimacy,[34] adoptive children,[35] testamentary capacity,[36] accountings,[37] and bequeaths

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[32] *Id.* at 1196.

[33] *Id.*

[34] Three cases in 1988 affected illegitimates: Primer v. Coleman, 521 So. 2d 863,869 (Miss. 1988) (where administrator of intestate estate knows of illegitimate children of intestate yet fails to serve notice to them of issuance of letters of administration, illegitimates not barred by time requirements of Miss. Code Ann. § 91-1-15(3)(c) (Supp. 1987)). *See* Estate of King, 501 So. 2d 1120, 1123 (Miss. 1987) (filing requirements for illegitimates presuppose good faith compliance by administrator with obligation imposed upon him by law to advise court and secure process upon all heirs known to him); *In re* Estate of Flowers, 493 So. 2d 950, 951 (Miss. 1986) (same); Miss. Code Ann. §§ 91-1-29 and 91-1-15(3)(c) (Supp. 1987). In *In re* Estate of Smiley, 530 So. 2d 18 (Miss. 1988) the court upheld Miss. Code Ann. § 91-1-15 (Supp. 1987), which creates a right of action in favor of illegitimate children. *Estate of Smiley*, 530 So. 2d at 23. *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977) (establishing that as matter of equal protection, states are limited in their ability to restrict illegitimates' inheriting from their fathers). In *In re* Estate of Stutts, 529 So. 2d 177 (Miss. 1988) the court held that res judicata and collateral estoppel will not bar illegitimates from asserting their paternity under Miss. Code Ann. § 91-1-15 because it (1) is a newly created cause of action and (2) because the former determination of their nonpaternity was not essential to that judgment. *Estate of Stutts*, 529 So. 2d at 180.

[35] The only 1988 case related to the rights of adoptive children in the estate area was Posey v. Posey, 528 So. 2d 833 (Miss. 1988), which held that where a will devises realty to a donee "for the term of her natural life and then unto the heirs of her body," adoptive children of the devisee are excluded because they are not heirs of the body of the devisee. *Posey*, 528 So. 2d at 835-37.

[36] Edwards v. Edwards, 520 So. 2d 1370, 1373 (Miss. 1988) (where subscribing witnesses to will testify that testator had testamentary capacity at time he executed will, then that testimony is entitled to greater weight than testimony of witnesses who were

of cash.[38]

A. *Changes in the Presumption of Undue Influence/Confidential Relationship Doctrine*

In *Rockwell v. Watkins*,[39] the Mississippi Supreme Court stressed the importance of the testator's obtaining meaningful, independent advice in rebutting the presumption of undue influence which arises due to the presence of a confidential relationship.[40] The case arose out of the 1978 conveyance by seventy-eight year old Gertrude McCray of 365 acres including her home to her physician, leaving four siblings with no interest in any of her real property.[41] At trial, the evidence showed that McCray was elderly, obese, unmarried, suffered from diabetes, arteriosclerosis, arthritis, and congestive heart failure.[42] She also suffered from hallucinations for several months prior to the conveyance in question.[43] Finding that a fiduciary relationship existed between Miss McCray and her physician, Dr. Watkins, and that the doctor was the dominant figure in the relationship, the chancellor nevertheless determined that Dr. Watkins had successfully rebutted the presumption of undue influence based upon a finding that McCray had received independent counsel from a competent, disinterested person devoted to her interest, namely, her lawyer of many years, Reese.[44]

In reversing, the Mississippi Supreme Court found the conveyance to be presumptively void.[45] Finding that Reese lacked adequate knowl-

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not present at time of will's execution). *See* Humes v. Krauss, 221 Miss. 301, 310 72 So. 2d 737, 739 (1954) (test of testamentary capacity "is ability of testator at time to understand and appreciate nature and affect of his act, natural objects or persons to receive his bounty, and their relation to him, and is capable of determining what disposition he desires to make of his property"); Fortenberry v. Herrington, 188 Miss. 735, 747, 196 So. 232, 236 (1940) (subscribing witnesses may testify as experts on question of testamentary capacity); Scaloy v. Wardlow, 123 Miss. 857, 878, 86 So. 625, 626 (1920) (capacity tested as of date of execution of will); Brock v. Luckett's Executors, 5 Miss. (4 How.) 459, 482 (1840) (testimony of subscribing witnesses entitled to greater weight).

[37] *See infra* text accompanying notes 47-55.

[38] Zimmerman v. Corley, 519 So. 2d 430, 433 (Miss. 1988) (where bequeath of "cash" is included in will, such term will be interpreted to include certificates of deposit).

[39] 522 So. 2d 731 (Miss. 1988).

[40] *Rockwell*, 522 So. 2d at 738.

[41] *Id.* at 732. McCray left the property in her will to her siblings, who, upon her death, made a motion for the chancery court to set aside the conveyance. *Id.*

[42] *Id.* at 732-37.

[43] *Id.*

[44] *Id.* at 732.

[45] *Id.* at 737.

edge on which to base the advice given Miss McCray, the court held the presumption not rebutted.[46]

In *Angle v. Estate of Angle*,[47] the court focused on the burden of proof that must be sustained by a grantee/beneficiary in establishing the accuracy of his accounting.[48] The case came up when one sibling filed suit against another alleging that the defendant had obtained an interest in certain real estate belonging to their mother, Mrs. Ina M. Angle, through the use of undue influence.[49] The lower court found that Mrs. Angle was totally dependent on the appellant/defendant and that therefore a confidential relationship existed between the appellant and his mother.[50] The court therefore set aside certain conveyances of real estate by Mrs. Angle to the appellant, and additionally ordered the appellant to file an accounting for all rents, profits and expenses with regard to the properties and to account for all other cash funds and personal property of Mrs. Angle which were held and managed by him to the time of trial.[51] The appellees objected to the accounting that was filed asserting that it was untimely, insufficient, and submitted in bad faith.[52] The chancellor agreed that the accounting was substantially incomplete and ordered Angle to pay $34,536.56 to the estate.[53]

Citing *Mullins v. Ratliff*,[54] the Mississippi Supreme Court affirmed the chancellor, holding that appellant Angle failed to meet his burden of proof in that he failed, by clear and convincing evidence, to properly

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[46] *Id.* at 740 (citing Murry v. Laird, 446 So. 2d 575, 578-79 (Miss. 1984)).

[47] 519 So. 2d 883 (Miss. 1988).

[48] *Angle*, 519 So. 2d at 885.

[49] *Id.* at 883.

[50] *Id.* at 884.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 515 So. 2d 1183 (Miss. 1987). In Murray v. Laird, 446 So. 2d 575 (Miss. 1984) the court explained that the existence of a confidential relationship gives rise to a presumption of undue influence. Consequently, the burden of going forward with the proof shifts to the beneficiary to prove by clear and convincing evidence:

(1) good faith on the part of the grantee/beneficiary;

(2) grantor's full knowledge and deliberation of his actions and their consequences; and

(3) advice of (a) a competent person (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Murray, 446 So. 2d at 578. *Mullins* modified the third prong of the above test by requiring that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited "independent consent and action." *Mullins*, 515 So. 2d at 1193.

account for monies he spent belonging to his mother.[55]

In what can only be seen as a retreat from the steady expansion of the confidential relationship doctrine over the years, which had created a situation in which it was doubtful that any elderly or infirm person could make a will that could not be successfully challenged,[56] the Mississippi Supreme Court handed down *Simm v. Adams*.[57] In *Simm*, the testator left a will naming Lucille Simm as executrix and sole beneficiary.[58] It was stipulated that a confidential and fiduciary relationship existed between the testator and Simm.[59] In invalidating the will, the chancellor held that Simm had failed to overcome the presumption of undue influence which arose from the confidential relationship which existed between Simm and the testator.[60]

The Mississippi Supreme Court reversed, finding that there was no evidence showing that Simm asserted any influence whatsoever over the testator in the preparation or execution of the will.[61] Thus, the court invoked the "active participation" doctrine,[62] and finding none, gave effect to the intent of the testator as found in the will and allowed

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[55] *Estate of Angle*, 519 So. 2d at 885.

[56] Traditionally, the confidential relationship could be proven by evidence that (1) a traditional confidential relationship existed between the testator and the beneficiary, and (2) that the beneficiary was an "active participant" in the making of the will. *See* McQueen v. Wilson, 131 Ala. 606, 31 So. 94 (1901); R.A. WEEMS, MISSISSIPPI WILLS AND ESTATES: CASES, STATUTES AND MATERIALS § 8-7 at 256 (1983). In Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959), the Mississippi Supreme Court held that the presumption arose in a situation where there was no traditional fiduciary relationship. *Croft*, 237 Miss. at 713, 115 So. 2d at 683. Subsequently, in *In re* Will of Moses, 227 So. 2d 829 (Miss. 1969), the court held that the presumption could arise "where the relationship is coupled with some suspicious circumstances such as mental infirmity of the testator." *Moses*, 227 So. 2d at 835. Thus the court used the "suspicious circumstances doctrine" in place of the need for showing active participation by the beneficiary, thereby placing a will contestant in an even more favorable position. *Id.* at 836. The Mississippi Supreme Court made the proponent's burden even more onerous in Murray v. Laird, 446 So. 2d 575 (Miss. 1984). *See supra* note 54. Cases after *Murray* seem to show a pattern in which the court has relaxed the burden on the proponent. *See* Estate of Haney, 516 So. 2d 1359, 1361 (Miss. 1987) (upheld finding that facially valid will should not be overturned); Mullins v. Ratcliff, 515 So. 2d 1183, 1184 (Miss. 1987) (sufficient mental capacity and lack of evidence of dominance overcame presumption); Costello v. Hall, 506 So. 2d 293, 297 (Miss. 1987) (court refused to impose presumption simply because of power-of-attorney).

[57] 529 So. 2d 611 (Miss. 1988).

[58] *Sims*, 529 So. 2d at 612. Simm had been the testator's housekeeper for approximately five years prior to his death. *Id.*

[59] *Id.* at 613.

[60] *Id.*

[61] *Id.* at 615.

[62] *Id.*; *see supra* note 56 (discussing "material participation" doctrine).

it to be admitted to probate.[63]

The court retreated even further from the presumption in *Miner v. Bertasi*.[64] In *Bertasi*, the ninety-two year old grantor, Adelino Bertasi, Sr., executed a deed on his farm to his two sons Anthony and Adelino, Jr.[65] Upon Adelino, Sr.'s death in 1982, Rosetta Minor, one of Adelino Sr.'s four children, sued her two brothers challenging the conveyance of the farm from Adelino, Sr. to his sons on the ground of undue influence.[66] The chancellor found that no confidential or fiduciary relationship existed between Adelino, Sr. and Anthony because their relationship did not involve one of the traditional bases of fiduciary relationships, such as attorney-client, guardian-ward, or trustee-beneficiary.[67]

The Mississippi Supreme Court rightly held that a presumption of undue influence should have arisen in the case because there appeared "weakness, dependence, or trust, justifiably reposed" from Adelino, Sr. to Anthony arising from Adelino, Sr.'s financial and physical dependence on Anthony.[68] Furthermore, the court found that both sons "actively participated" in the transaction because Anthony paid five dollars to Adelino, Sr. on Adelino, Jr.'s behalf and five dollars on his own behalf as consideration for the deed.[69] In spite of this, the court upheld the deed, finding from the evidence that Adelino, Sr. was "sharp, strong-willed and not susceptible to outside influence."[70] Thus the presumption of undue influence was successfully rebutted.[71]

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[63] *Id.*

[64] 530 So. 2d 168 (Miss. 1988).

[65] *Miner*, 530 So. 2d at 169. Anthony was present when Adelino, Sr. signed the deed, but Adelino, Jr. was not. *Id.* at 169-70. Adelino, Sr. received advice from one John Masserano, Anthony's son-in-law and an attorney. *Id.* It should also be noted that Adelino, Sr. lived with Anthony. *Id.*

[66] *Id.*

[67] *Id.* at 170.

[68] *Id.* The court stated that fiduciary or confidential relationships can arise in a legal, moral, domestic, or personal context, where there appears "on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed." *Id.* at 170 (quoting Estate of Haney, 516 So. 2d 1359, 1361 (Miss. 1987); Mullins v. Ratcliff, 515 So. 2d 1183, 1191 (Miss. 1987); *In re* Estate of Bilello, 317 So. 2d 916, 917 (Miss. 1975)). Thus the court rejected the requirement of the "transaction of some business" characterized as attorney/client, guardian/ward, etc. *Id.* at 170.

[69] *Id.* at 171.

[70] *Id.* at 171-72.

[71] *Id.* The court was satisfied that Adelino, Jr. and Anthony had, by clear and convincing evidence, rebutted the presumption by meeting the *Murray* factors. *Id.* at 171-72; *see Murray*, 446 So. 2d at 578.

III. Insurance Law

A. Punitive Damages

The issue of whether or when to award punitive damages against insurance companies remained very much in the court's attention in 1988.

In *Independent Life & Accident Ins. Co. v. Peavy*,[72] the appellant insurance company issued a $10,000 life insurance policy on the appellee.[73] The policy provisions included a waiver of premium in case of disability, and double indemnity in case of accidental death.[74] If the premium became waived, the double indemnity was lost.[75] In order to obtain the benefit of the waiver of premium provision, the insured was required to notify the company in writing of his disability during the period of total disability.[76] After becoming totally disabled in 1979, the appellee, in 1980, filed a claim for waiver of premium which was returned because it was not on the correct form.[77] The appellee's insurance agents, Watson and Davis, persuaded the appellee not to file the correct form for two reasons, one of which was true, i.e., that by filing for waiver of premium the insured would forfeit the double indemnity provision of his policy.[78] The other reason given was false, which was that if, *at any time* he thought he could not pay the premiums, then the insured needed only to submit the claim form.[79] In April, 1982, after the insured was no longer totally disabled but rather partially disabled, the appellee filed a claim.[80] Because the claim was not submitted during the period of total disability, the appellant insurance company denied the claim.[81] The trial court awarded the appellee

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[72] 528 So. 2d 1112 (Miss. 1988).

[73] *Peavy*, 528 So. 2d at 1113.

[74] *Id.*

[75] *Id.*

[76] *Id.* The provision read in pertinent part:

> NOTICE OF CLAIM: No claim for benefits hereunder shall be valid unless total disability is established as provided elsewhere herein and written notice thereof is given to a received by the Company during the lifetime of the Insured and *during the continuance of total disability.*

Id. at 113-14 (emphasis added).

[77] *Id.* at 1114. Peavy was injured while working for Pearl Steel Erectors. *Id.* at 1113. The injury occurred when a 3500-pound steel beam fell on his leg. *Id.*

[78] *Id.* at 1114.

[79] *Id.* (emphasis added). At trial, the agents denied telling Peavy that he could wait to submit the claim. *Id.*

[80] *Id.*

[81] *Id.* The policy defined total disability as:

> [I]ncapacity to engage in any occupation for remuneration or profit which inca-

$250,000 in punitive damages.[82]

The Mississippi Supreme Court agreed that the facts presented amounted to a breach "attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort."[83] Although the appellant technically had an arguable reason to deny the claim, the actions of its agents, Watson and Davis, would be attributed to it, and those actions gave rise to the punitive damages claim.[84] In so awarding punitive damages, the court rejected the appellant's argument that the punitive damages should bear a reasonable relationship to actual damages in order not to be arbitrary or unreasonable.[85]

In *Life & Casualty Co. of Tennessee v. Bristow*,[86] the Mississippi Supreme Court held that where an insurer relies on the statements of an insured's physician in making decisions about benefits under the "own occupation/any occupation"[87] provisions of a disability policy,

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pacity is the result of bodily injury or disease suffered or contracted after the date of this disability provision; . . . .

Id.

[82] *Id.* at 1115.

[83] *Id.* (citing Fedders v. Boatright, 493 So. 2d 301, 311 (Miss. 1986)). The court noted that punitive damages are assessed as an example and warning to others and thus are to be allowed with caution. *Id. See* Gardner v. Jones, 464 So. 2d 1144, 1148 (Miss. 1985) (punitives should only be awarded in extreme cases); Consolidated Am. Life v. Toche, 410 So. 2d 1303, 1304 (Miss. 1982) (punitives should be awarded cautiously); Progressive Casualty Ins. Co. v. Keyes, 317 So. 2d 396, 398 (Miss. 1975) (when punitive damages are appropriate in action for breach of contract).

[84] *Peavy*, 528 So. 2d at 1115. Normally, the existence of an arguable reason for refusing to pay a claim is a good defense. *See* State Farm Fire and Casualty Co. v. Simpson, 477 So. 2d 242 (Miss. 1985); *Progressive Casualty*, 317 So. 2d at 396. That an insurer may be held liable for actual and punitive damages based on its agents' actions is supported by National Life & Accident Ins. Co. v. Miller, 484 So. 2d 329, 334 (Miss. 1985) (insurer denied claim because policy application form failed to reveal insured's heart murmur; omission was responsibility of soliciting agent, who was aware of murmur).

[85] *Peavy*, 528 So. 2d at 1120. Appellant's argument was based on cases from other jurisdictions which arguably required some relation between the amount of punitive damages and the amount of actual damages. *See, e.g.*, Johnson v. American Liability Ins. Co., 335 F. Supp. 390 (W.D. Mo. 1971); Dowling v. J.C. Penney Co., 300 F. Supp. 307 (W.D. Pa. 1969); Wegner v. Rodeo Cowboys Assoc., 290 F. Supp. 369 (D. Colo. 1968).

[86] 529 So. 2d 620 (Miss. 1988).

[87] *Bristow*, 529 So. 2d at 621. These provisions in the policy in question read as follows:

> Total disability means the complete inability of the insured to perform the duties of his *regular occupation*, except if indemnities have been paid for 24 months of a continuous disability, then . . . "total disability" shall mean the complete inability of the insured to perform the duties of *any occupation* for which he is reasonably fitted by his education, training and experience . . . .

the insurer had arguable grounds for denying benefits under the policy and thus punitive damages were not available.[88] The appellee, Bristow, an electrician, broke his arm in 1980.[89] The appellant (Life and Casualty) issued total disability benefit checks for twenty-four months before reviewing Bristow's file to determine whether Bristow was unable to perform the duties of any occupation for which he was reasonably fitted.[90] Bristow's own physician informed Life and Casualty that while Bristow was still totally disabled as to his regular occupation, he was not totally disabled from other occupations that "did not involve heavy manual work, working on ladders, or with overhead objects."[91] Based on these statements, Life and Casualty discontinued disability payments.[92] Feeling aggrieved, Bristow brought suit seeking compensatory and punitive damages.[93] The trial court awarded Bristow $50,000 in compensatory damages for emotional distress and six million dollars in punitive damages for his bad faith claim against the insurance company.[94]

In response to Life and Casualty's argument that the issue of punitive damages should never have been submitted to the jury, the Mississippi Supreme Court agreed and reversed the trial court.[95] The court enunciated the test of Mississippi law for deciding whether or not the question of punitive damages should go to the jury. The court applied a two-step test: (1) there must be a finding that the insurance company had no "legitimate or arguable reason to deny payment of the claim,"[96] and (2) there must be a "showing of malice, gross negligence, or wanton disregard for the rights of the insured."[97] The court then concluded that where an insurer relied on the statements of the insured's physician in making decisions about benefits under a disability policy, the insurer had an arguable reason for denying benefits under the policy.[98]

Id. at 621 (emphasis added).

[88] *Id.* at 624.

[89] *Id.* at 621.

[90] *Id.* at 621-22.

[91] *Id.* at 622.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 625.

[96] *Id.* at 622 (quoting Reserve Life Ins. Co. v. McGee, 444 So. 2d 803, 809 (Miss. 1983); Blue Cross/Blue Shield of Miss. v. Campbell, 466 So. 2d 833, 842 (Miss. 1984)).

[97] *Id.* at 622 (citing Pioneer Life Ins. Co. of Ill. v. Moss, 513 So. 2d 927, 930 (Miss. 1987)). Both of these questions are questions of law, to be decided by the trial judge. *Id.* at 623 (citing *Pioneer Life*, 513 So. 2d at 930).

[98] *Id.* at 624. Additionally, the court found that there was no substantial evidence to

B. Stacking of Uninsured Motorist Coverage

In the area of uninsured motorist coverage, insurance companies continued to argue in 1988 that "stacking" of coverage should not be allowed, but the Mississippi Supreme Court continued to reject that argument. In *Wickline v. U.S. Fidelity & Guaranty Co.*,[99] the decedent guest passenger Stacy Wickline was killed when the car in which she was riding crashed into a parked car.[100] The driver of the car was Mills Carter, III and the owner Mills Carter, Jr.[101] The Carter vehicle was covered by a liability/uninsured motorist (UM) policy issued by United States Fidelity and Guaranty Company (USF&G).[102] The Carters owned four vehicles, all of which were covered under the UM policy up to $10,000 per person or $20,000 per accident.[103] The decedent's mother and sister sued USF&G, claiming that each was entitled to the $10,000 per person UM limit on each of the four Carter vehicles, or a total of $80,000.[104] The trial court held that the Wicklines could not "stack" the coverage for all four vehicles covered under the USF&G UM policy.[105]

On appeal, the Mississippi Supreme Court initially addressed the question of whether the Carter vehicle was an uninsured vehicle. The court noted that section 83-11-103(c)(iii) of the Mississippi Code incorporated the "underinsured" motorist concept, which compares the limits of the tortfeasor's liability coverage to the limits applicable to the injured person provided under his UM coverage.[106] Since the liability

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support Bristow's claim for compensatory damages for mental distress, noting that such damages cannot be considered in the absence of finding "an independent intentional tort suffered from the breach of contract." *Id.* (citing Blue Cross and Blue Shield of Miss., Inc. v. Maas, 516 So. 2d 495, 498 (Miss. 1987); Aetna Casualty & Surety Co. v. Day, 487 So. 2d 830, 835 (Miss. 1986); State Farm Fire & Casualty Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985)).

[99] 530 So. 2d 708 (Miss. 1988).

[100] *Wickline*, 530 So. 2d at 710.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* Immediately after the accident, USF&G paid Stacy Wickline's survivors $10,000 as limits of its liability per person coverage. *Id.* The Wicklines, however, sought to recover the $10,000 limit on each of the four Carter vehicles (totaling $40,000 for each of them, or $80,000 total). *Id.*

[105] *Id.* at 711.

[106] *Id.* at 712. MISS. CODE ANN. § 83-11-103 defines "uninsured motor vehicle" as:

> (iii) an insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured vehicle which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . .

limits for the Carter vehicle were less than the limits applicable to Stacy Wickline (her own State Farm policies plus Carter's USF&G liability policies),[107] the Carter vehicle was an "underinsured" vehicle.[108] The court agreed that the Wicklines were "insureds," rejecting the distinction between "class one" and "class two" insureds found in some earlier cases.[109] USF&G argued that because Stacy Wickline did not pay any premiums, it would be unjust to allow her to stack,[110] but the court disposed of this argument by using a third-party beneficiary theory.[111] The court noted that stacking of multiple coverages within a single policy has been mandated in Mississippi by prior case law.[112] The court further stated that since Mills Carter, Jr. paid the premiums for the benefit of all insureds, including the statutory UM beneficiary Stacy Wickline, USF&G would reap an unfair advantage if it were able to deny stacking in this case.[113]

MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1988). The phrase "applicable to the injured person" in turn means that if an injured person is insured under more than one policy of uninsured motorist coverage, the limits of each such policy are applicable to him. Harthcock v. State Farm Mut. Automobile Ins. Co., 248 So. 2d 456, 462 (Miss. 1971). According to the court, if the injured person is injured while riding as a passenger, the uninsured motorist coverage of the vehicle in which he is riding, in addition to that of his own vehicles, is "applicable to the injured person". *Wickline*, 530 So. 2d at 713 (citing Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536 (Miss. 1975)).

[107] *See supra* note 106.

[108] *Wickline*, 530 So. 2d at 713.

[109] *Id.* at 714. MISS. CODE ANN. § 83-11-103(B) defines "insureds" as:

> [T]he named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, any person who uses, with the consent, express or implied of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above.

MISS. CODE ANN. § 83-11-103 (B) (Supp. 1988). The trial court had determined that the statute created two classes of insureds, i.e., the named insured and his family as opposed to anyone else coming under the statutory definition. *Wickline*, 530 So. 2d at 714. The trial court then decided that, since Wickline had no connection with the other three Carter vehicles and was not a Carter family member, no stacking would be permitted. *Id.* at 714. Earlier cases making this distinction to which the court referred, were Aetna Casualty & Surety Co. v. Barker, 451 So. 2d 731 (Miss. 1984); Lowery v. State Farm Mutual Automobile Ins. Co., 285 So. 2d 767 (Miss. 1984). *Wickline*, 530 So. 2d at 714.

[110] *Wickline*, 530 So. 2d at 714.

[111] *Id.*

[112] *Id.* The court noted that stacking had become a "positive gloss" upon Mississippi's uninsured motorist act. *Id.* (citing Brown v. Maryland Casualty Co., 521 So. 2d 854 (Miss. 1987); Pearthree v. Hartford Accident and Indemn. Co., 373 So. 2d 267 (Miss. 1979); Hartford Accident and Indemn. Co. v. Bridges, 350 So. 2d 1379 (Miss. 1977)).

[113] *Id.* at 714.

Finally, the court agreed with USF&G's contention that the plaintiffs were not each entitled to recover the per person policy limits. Because of the derivative nature of their claim, the plaintiffs had to recover by way of representation, and not per capita.[114]

C. *Burden of Proof in Civil Arson Cases*

In *McGory v. Allstate Insurance Co.*,[115] the insureds bought a fire insurance policy from Allstate Insurance Company (Allstate) covering some residential rental property and an adjacent bar-b-que restaurant.[116] Subsequently, the residential property was substantially damaged by fire.[117] Allstate filed a declaratory action seeking an adjudication of non-liability because, it alleged, the McGorys had intentionally burned the building.[118] The jury was instructed that Allstate was entitled to void coverage if they could prove by a preponderance of the evidence that the insureds had burned their own property.[119]

Finding no justification for a distinction between civil arson and other types of common law fraud, the supreme court reversed, holding that the traditional fraud standard of "clear and convincing" was

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[114] *Id.* The court also held that USF&G was entitled to an offset of the liability payments made. *Id.* at 717.

[115] 527 So. 2d 632 (Miss. 1988).

[116] *McGory*, 527 So. 2d at 633.

[117] *Id.*

[118] *Id.* at 634. At trial, two firemen and an expert testified that the fire was incendiary (deliberate), and had been started with an accelerant. *Id.* The evidence showed that at the time of the fire, the insureds were in debt over $50,000, had allowed several other insurance policies to lapse, and the policy covering the damaged property was due for cancellation. *Id.* On the day of the fire, the insured called his agent to be sure that the coverage on the residential property was still in effect. *Id.* at 636. No evidence was adduced at trial, however, that the insured had hired someone to burn the property, and both insureds had solid alibies for the time of the fire. *Id.*

[119] *Id.* at 638. The jury instruction read in pertinent part: "The court instructs the jury that under Mississippi law if an insured intentional caused the burning of his insured property he may not recovery [sic] the proceeds of any insurance policy insuring said property against fire loss; and if you find from a preponderance of the evidence . . . ." *Id.* at 638 n.1.

Mississippi law allows arson to be proved circumstantially. *Id.* at 634. There are three elements of the circumstantial claim: (1) an incendiary fire; (2) motive of the insured to destroy the property; (3) evidence that the insured had the opportunity to set the fire or to procure its being set by another. *Id.* at 635 (citing, *inter alia*, Davidson v. State Farm Fire & Casualty Co., 641 F. Supp. 503, 507 (N.D. Miss. 1986); Vicksburg Furniture Mfg. Ltd., v. Aetna Casualty & Surety Co., 625 F.2d 1167, 1171-72 (5th Cir. 1980)). The court held that the circuit court properly denied the McGory's motion for judgment notwithstanding the verdict even though Allstate put forward no proof as to the third leg of the three-part test. *Id.* at 636-37.

proper.[120]

D. *Duty of Liability Insurance Carrier to its Insured to Settle a Lawsuit Within Policy Limits*

In *Hartford Accident & Indemnity Co. v. Foster*,[121] the Mississippi Supreme Court attempted to clearly delineate the responsibilities of insurance companies and defense attorneys to an insured under a liability policy where there has been an offer to settle a lawsuit against the insured below the policy limits. In a rather lengthy and confusing opinion, the court held that where an offer of settlement is made within the liability policy limits, the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own,[122] and that defense attorneys hired by the carrier are its agents for whom it has the customary legal liability.[123] Their duty is to fully disclose the conflict of interest to both parties and to inform the insured of his need for his own counsel, and then to evaluate the case with competency and utmost good faith, with the best interest of both clients in mind.[124]

The case arose when a truck owned and operated by Foster's Furniture Business and driven by an employee collided with a car operated by one Sims, whose arm was severely injured.[125] Sims sued Foster, who was insured by Hartford up to $50,000.[126] Hartford hired Jackson attorney Curtis Coker to represent the insured.[127] The weakness of Sims' case was evidenced by the fact that during the trial he offered to settle three times.[128] All the offers were below the $50,000 policy limit, so it was in Foster's interest to settle.[129] There was a factual dispute as

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[120] *Id.* at 636. The court remanded the case for retrial using the "clear and convincing standard in the jury instruction." *Id.* at 640.

[121] 528 So. 2d 255 (Miss. 1988).

[122] *Foster*, 528 So. 2d at 265. Two earlier opinions, Farmer's Gin Co. v. St. Paul Mercury and Indemn. Co., 186 Miss. 747, 191 So. 415 (1939) and Georgia Casualty Co. v. Cotton Mills Products, 159 Miss. 396, 132 So. 73 (1931) contained statements contrary to the court's pronouncement of the insurer's duty, so to the extent that the holdings in these cases are contrary to *Foster* the court expressly overruled them. *Foster*, 528 So. 2d at 265.

[123] *Id.* at 268.

[124] *Id.* at 273.

[125] *Id.* at 257.

[126] *Id.*

[127] *Id.* at 258.

[128] *Id.* at 260-61.

[129] *Id.*

to whether Foster was informed of the second and third offers.[130] Because Coker and Hartford thought they had a strong case, they refused to settle for more than $25,000.[131] Sims' lowest offer was $30,000.[132] There was no evidence that Foster would have been willing to make up the difference.[133] The trial proceeded to a verdict and judgment thereon was entered in the amount of $80,000 against Foster,[134] who in turn sued Hartford and his lawyers in Simpson County,[135] winning on theories of bad faith refusal to settle and breach of a lawyer's fiduciary duty to him in declining a reasonable settlement offer.[136]

The Mississippi Supreme Court found that as to Hartford, there was simply no evidence of bad faith on its part in rejecting the offer, because, based on its attorneys' evaluation, it had every reason to believe that its insured was not at fault.[137] The question then became whether Hartford should be liable for the actions of its attorneys in their breach of fiduciary duty to Foster, through principles of respondeat superior.[138] The court held that Hartford would be liable for the negligence or bad faith of its attorneys had they breached these duties to Hartford's insured.[139] The court found, however, that there was no such breach in this case.[140] The court then stated the proper procedure for the lawyer who finds himself in this situation: He or she should halt proceedings until a decision can be made; he or she then is to fully disclose to each client the terms of the settlement offer and the ramifications thereof; particularly, he should point out to the insured his need for his own counsel. If this is done, the attorney should not then be prohibited from honestly and carefully answering questions pertaining to the law and facts, including his impression of the strengths and weaknesses of the case.[141] In the instant case, the court found that Fos-

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[130] *Id.* at 261.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 262-63. This fact is of significance since by paying the $5,000 difference Foster could have avoided having to pay the $30,000 excess over the policy limits which he was required to pay.

[134] *Id.* at 259.

[135] *Id.* at 260.

[136] *Id.* at 263.

[137] *Id.* at 266.

[138] *Id.* at 267-68.

[139] *Id.*

[140] *Id.* at 275-76.

[141] *Id.* at 273. In answering the question of the attorney's duty in this situation, the court turned to the Mississippi Code of Professional Conduct. *Id.* at 268. The rule on conflicts of interest is Rule 1.7 which reads:

ter had failed to show how he was damaged since there was no evidence that he would have been willing to pay the difference between Hartford's offer of $25,000 and Simm's offer of $30,000.[142]

The dissenting justices[143] would have imposed a duty on Hartford to, *inter alia*, settle Sims' claim within the policy limits "on objectively reasonable terms," the definition of which the dissent would leave to the jury.[144] The dissenters would impose a duty on the attorneys to try as best they could to persuade the insurer to settle the case within the policy limits.[145] Justice Robertson went even further by saying that the lawyer's duty is to the insured to the exclusion of the insurer if the lawyer does not limit the scope of his representation as provided by Mississippi Rule of Professional Conduct 1.2(a) and (c).[146]

> "(a) a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes: (1) the representation will not adversely affect the relationship with the other client; and (2) each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.
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> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless the lawyer reasonably believes: (1) the representation will not be adversely affected; and (2) the client has given knowing and informed consent after consultation . . . .

MISS. CODE OF PROFESSIONAL CONDUCT Rule 1.7.

[142] *Foster*, 528 So. 2d at 275. *See supra* note 133 and accompanying text.

[143] Justice Prather dissented, joined by Dan Lee, as to the liability of Hartford, and Robertson, who dissented with a separate opinion. Justice Sullivan did not participate. *Foster*, 528 So. 2d at 276.

[144] *Id.* at 282-83 (Prather, J., dissenting).

[145] *Id.* at 290 (Robertson, J., dissenting).

[146] *Id.* at 292 (Robertson, J., dissenting). Mississippi Rule of Professional Conduct 1.2(c) deals with the lawyer's prerogative to limit the scope of his representation of a client who consents after consultation. It reads:

> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.

The official comment to Model Rule 1.2(c) states in pertinent part:

> (1) The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . . When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage . . . .

Id. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) Comment (1983). Justice Robertson would have ruled that because Coker did not so limit his scope of representation to Foster, Foster was his *only* client. *Foster*, 528 So. 2d at 292 (Robertson, J., dissenting).

E. Other Insurance Cases

Other insurance cases were handed down in 1988 covering a broad range of issues.[147]

IV. Miscellaneous

In 1988, the Mississippi Supreme Court decided miscellaneous cases regarding taxation,[148] Mississippi constitutional questions,[149] fed-

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[147] These insurance cases are: Mink v. Andrew Jackson Casualty Ins. Co., 537 So. 2d 431, 434 (Miss. Dec. 21, 1988) (summary judgment improper where alleged that agent was acting as agent for insured when he secured coverage on ordinarily uninsurable structure - agency relationships are questions of material fact); State Farm Mutual Auto Ins. Co. v. Mettetal, 534 So. 2d 189, 194 (Miss. 1988) (Motor Vehicle Safety Responsibility Law, Miss. Code Ann. § 63-15-43 (1972 & Supp. 1987), does not apply to all automobile liability insurance policies, but only to those certified as proof of financial responsibility) (*overruling*, United States Fidelity & Guaranty Co. v. Stafford, 253 So. 2d 388 (Miss. 1971), State Farm Mutual Auto. Ins. Co. v. Moore, 289 So. 2d 909 (Miss. 1974) and Vaughn v. State Farm Mutual Auto. Ins. Co., 359 So. 2d 339 (Miss. 1978); State Farm Ins. Co. v. Gay, 526 So. 2d 534, 538 (Miss. 1988) (proof of mailing satisfies notice requirement for cancellation of insurance policy due to non-payment); State Farm Auto. Ins. Co. v. Gregg, 526 So. 2d 554, 558 (Miss. 1988) ("med pay" provision which covered "medical expenses" as well as health care expenses other than those provided by a physician; chiropractic expenses are covered); Tew v. Dixieland Finance, Inc., 527 So. 2d 665, 673 (Miss. 1988) (corporate creditors not allowed to receive commission payments or be licensed as insurance agents to write credit life and disability insurance-prospective-effective July 1, 1989); Colonial Mortgage Co. v. Lee, 525 So. 2d 804, 808 (Miss. 1988) (punitive damages not appropriate where reasonable, hypothetical trier of fact could not have found either malice, gross neglect or reckless disregard); Estate of Osborn v. Gerling Global Life Ins. Co., 529 So. 2d 169, 172 (Miss. 1988) (where reinsurance contract's language shows intent to share liabilities rather than strictly to indemnify, reinsurer is directly liable to policy holders of reinsuring company); Mississippi Ins. Guaranty Ass'n. v. Vaughn, 529 So. 2d 540, 543 (Miss. 1988) (disability insurance is synonymous with accident and health insurance for purposes of coverage under Mississippi Insurance Guaranty Association Law); Coleman v. Sanford, 521 So. 2d 876, 877 (Miss. 1988) (intentional shooting on highway not covered by uninsured motorist policy); Sanford v. Federated Guaranty Ins. Co., 522 So. 2d 214, 217 (Miss. 1988) (where false statement by insured on application is representation, not warranty, lack of materiality is question of fact which can preclude rescission).

[148] *See* Commissioner v. Bounds, 528 So. 2d 822, 827 (Miss. 1988) (taxpayer's uncorroborated testimony that he sold goods at or below cost, coupled with failure to keep adequate records, does not overcome Commissioner's prima facie correct assessment).

[149] *See* Burrell v. Miss. State Tax Comm'n, 536 So. 2d 848, 859 (Miss. 1988) (where multiple constitutional amendments relate to same subject matter, such amendments may be voted on by voters as a single amendment under Miss. Const. § 273 (1890)); Smith v. Dorsey, 530 So. 2d 5, 7 (Miss. 1988) (contracts between school board and spouses of its members violated Miss. Const. § 109 (1890)).

eral constitutional questions,[150] trusts,[151] attorney fees,[152] and issuance of school bonds.[153]

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[150] *See* Wicks v. Mississippi Valley State University, 536 So. 2d 20, 23 (Miss. 1988) (where neither state law, regulation, nor university policy create legitimate expectation of continued employment for non-tenured university professor, but instead vests tenure decision within sole discretion of administrator, there is no legitimate constitutionally protected property interest in grant of tenure); Collier v. Shell Oil Co., 534 So. 2d 1015, 1018 (Miss. 1988) (Equal Protection Clause, read after Trimble v. Gordon, 430 U.S. 762 (1977), not applied retroactively so as to deprive bona fide purchases of their interest in land); Jones v. Board of Trustees, 524 So. 2d 968, 972 (Miss. 1988) (when student faces suspension or expulsion, minimum due process requires notice and opportunity to be heard, however, denial of procedureal due process will not be found unless aggrieved party can show substantial prejudice).

[151] *See* Walker v. Cox, 531 So. 2d 801, 804 (Miss. 1988) (hostility on part of trustee toward income beneficiary is proper ground for removal of trustee).

[152] *See* Bondafoam v. Cook Const. Co., 529 So. 2d 655, 659 (Miss. 1988) (where there is no statutory nor contractual basis for award of attorney's fees and where defendant has not acted with such reckless or wanton disregard for plaintiff's rights as to justify punitive damages, attorney's fees may not be awarded).

[153] *See* In Re Validation of 19,800,000 General Obligation School Bonds, Series 1987, Madison County, MS dated November 1, 1987, 534 So. 2d 1025, 1027 (where school board's resolution of intent to issue general obligation school bonds set out approximate amount of indebtedness to be incurred, and purpose for which money so borrowed was to be expended, school board's resolution was sufficiently specific to obtain judicial validation of bonds).

PROPERTY

During 1988, the Mississippi Supreme Court issued property related decisions in the areas of conveyances and the construction of conveyances,[1] matters affecting title,[2] eminent domain,[3] easements,[4] zon-

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[1] *See* Whittington v. Whittington, 535 So. 2d 573, 587 (Miss. 1988) (subsequent grantee's right to deferred bonuses under prior lease); Manson v. Magee, 534 So. 2d 545, 547-48 (Miss. 1988) (unambiguous conveyance will not be construed to convey interest greater than that possessed by grantor); Walters v. Petterson, 531 So. 2d 581, 584 (Miss. 1988) (one must establish retention of possession by clear, unequivocal, convincing evidence; then prove contract to reconvey to defeat deed absolute on face); Knox v. Shell Western E & P, Inc. 531 So. 2d 1181, 1185 (Miss. 1988) (terms of deed absolute on face properly interpreted by chancellor); Deason v. Cox 527 So. 2d 624, 626 (Miss. 1988) (reserving interest not possessed by grantor creates ambiguity which must be construed against grantor); C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 528-29 (Miss. 1988) (wait and see doctrine followed where required contingency for interest to vest actually occurs during perpetuity period); Burch v. Hillman, 525 So. 2d 396, 399 (Miss. 1988) (extrinsic evidence admitted where deed is unclear or ambiguous); Thornhill v. System Fuels, Inc., 523 So. 2d 983, 992 (Miss. 1988) (grant of entire interest in minerals conveys all incidents of ownership that are not specifically excepted or reserved); *In re* Conservatorship of Stevens v. Patrick, 523 So. 2d 319, 332 (Miss. 1988) (absent other factors, weakness of intellect which does not rise to level of total incapacity is insufficient basis to set aside deed).

[2] *See* R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1011 (Miss. 1988) (complete, continuous, and unexplained non-use of public way by general public for period exceeding ten years gives rise to presumption of abandonment by city); Breedon v. Tucker, 533 So. 2d 1108, 1110 (Miss 1988) (to succeed in adverse possession against grantees of remainder of life estate, claimant must be in possession for ten years after expiration of life estate); Aldridge v. Aldridge, 527 So. 2d 96, 100 (Miss. 1988) (notice of lis pendens not filed in lis pendens records will not impute valid legal notice to subsequent purchaser); McNeely v. Jackson, 526 So. 2d 541, 545 (Miss. 1988) (where sporadic use of road with permission of would-be adverse possessors, then domination of road and exclusion of public not complete and continuous enough to constitute abandonment); Welford v. Dickerson, 524 So. 2d 331, 335 (Miss. 1988) (where defendant's actions demonstrate absence of good faith, attorney's fees are recoverable as element of damage in slander of title action); Cheecks v. Herrington, 523 So. 2d 1033, 1036 (Miss. 1988) (latches provides no defense in absence of showing of unequivocal ouster); Merchants Nat'l Bank v. Stewart, 523 So. 2d 961, 965 (Miss. 1988) (doctrine of merger will not constitute grounds for reversal of judgment of civil contempt for failure to abide by court order); Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 908 (Miss. 1988) (open, continuous possession of property together with usual acts incident to ownership, is sufficient to raise presumption of previous grant by sovereign).

[3] *See* State Highway Comm'n of Miss. v. Culpepper, 536 So. 2d 18, 19-20 (Miss. 1988) (where trial court unduly restricts discovery so that party cannot fully present case, resulting jury verdict cannot stand); Dykes v. State Highway Comm'n of Miss., 535

ing actions,[5] sixteenth section lands,[6] and oil and mineral interests.[7] The majority of the issued opinions made no change in Mississippi property law; those cases will only be treated in footnotes. Textual treatment will be given to five opinions which have affected Mississippi law[8] or have provided new statutory interpretations.[9] Also, two opin-

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So. 2d 1349, 1354 (Miss. 1988) (reversible error for commission counsel to refer to jurors as taxpayers for whom commission works when continued over objections of opposing counsel); Crocker v. Miss. State Highway Comm'n, 534 So. 2d 549, 553-54 (Miss. 1988) (where landowner had introduced evidence of fair market value of property remaining after condemnation under income approach, cost approach, and market data/sales comparison approach, court's refusal to admit evidence under second income approach will not constitute reversible error); State Highway Comm'n of Miss. v. Rankin County Bd. of Educ., 531 So. 2d 612, 614 (Miss. 1988) (maximum fee which may be awarded court appointed appraiser under MISS. CODE ANN. § 11-27-89 (Supp. 1986) cannot exceed $300.00); Miss. State Highway Comm'n v. Viverette, 529 So. 2d 896, 900-01 (Miss. 1988) (trial judge should allow new trial if compensation award is so grossly excessive as to evidence bias, passion, or prejudice, or not based on competent facts).

[4] *See* Miss. State Highway Comm'n v. McClure, 536 So. 2d 895, 896 (Miss. 1988) (commission does not have authority to sell highway right-of-way easement granted for specific highway project); Miss. State Highway Comm'n v. New Albany Gas Station, 534 So. 2d 204, 207 (Miss. 1988) (commission is not estopped through latches to demand removal of gas line attached to bridge for over thirty years and is not required to share in expenses of removal); Gulf Park Water Co. v. First Ocean Springs Dev. Co., 530 So. 2d 1325, 1332 (Miss. 1988) (easement unilaterally planned by grantor at time of transfer and not reserved in deed will not be implied to grantee's property).

[5] *See* Noble v. Scheffler, 529 So. 2d 902, 907 (Miss. 1988) (local zoning authorities must enforce all applicable zoning restrictions unless empowered to grant exception); Luter v. Hammon, 529 So. 2d 625, 628 (Miss. 1988) (if zoning or rezoning decisions are fairly debatable, then courts have no authority to overturn them).

[6] *See* Oktibbeha County Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 589 (Miss. 1988) (Miss. Const. section 211 as amended February 4, 1944, is not self-executing and section 16 land leases executed for ninety-nine years prior to the 1946 legislative enactment are void).

[7] *See* Pursue Energy Corp. v. State Oil and Gas Bd., 524 So. 2d 569, 572 (Miss. 1988) (interest expense incurred by operator of drilling unit is not necessary cost of drilling and is not chargeable against the interest of non-consenting owners force-pooled into drilling unit).

[8] *See* R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1011 (Miss. 1988) (presumption of abandonment by city of public way where there is complete, continuous, and unexplained non-use by general public); McNeely v. Jacks, 526 So. 2d 541, 545 (Miss. 1988) (claim of abandonment of public road defeated by sporadic use of road way where use is with claimant's permission); Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 908 (Miss. 1988) (presumption of grant by sovereign which divest sovereign of title raised by open, continuous possession of property).

[9] *See* Oktibbeha County Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 589 (Miss. 1988) (Miss. Const. section 211, as amended February 4, 1944, is not self executing; section 16 leases executed prior to legislative enactment are void); Pursue Energy Corp. v. State Oil and Gas Bd., 524 So. 2d 569, 572 (Miss. 1988) (interest expense incurred by

ions concerning the interpretation of conveyances, an area which was predominant in the Mississippi Supreme Court property decisions for 1988, will also be discussed.[10]

I. Matters Affecting Title

During the 1988 term, the Mississippi Supreme Court addressed issues relating to government title to property. Specifically, the court in *Monroe County Board of Education v. Rye*[11] held that certain fact situations could give rise to a presumption that the state had divested itself of title and perfected title in the occupants of the property.[12] In *Monroe County*, the County Board of Education appealed a Monroe County Chancery Court ruling which cancelled the claims asserted by the Board of Education.[13] Further, the chancellor held good title had vested in the appellees.[14] The property concerned passed by various deeds, leases, and conveyances to the Ryes as three separate parcels.[15]

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operator of drilling unit is not necessary cost of drilling and not chargeable against interest of non-consenting owners).

[10] *See* C & D Inv., Co. v. Gulf Transp. Co., 526 So. 2d 526, 528-29 (Miss. 1988) (wait and see doctrine followed where required contingency for interest to vest actually occurs during perpetuity period); Thornhill v. System Fuels, Inc., 523 So. 2d 983, 992 (Miss. 1988) (grant of entire interest in minerals conveys all incidents of ownership that are not specifically excepted or reserved).

[11] 521 So. 2d 900 (Miss. 1988).

[12] *Monroe County*, 521 So. 2d at 908.

[13] *Id.* at 902. The Board sued to remove clouds and confirm title in the Board of 200 acres of land in Monroe County. *Id.* at 901-02. The opinion is silent as to why or how the Board chose this time to assert title. In fact, it appears that the Ryes as owners in possession had made use of the property for a number of years prior to this action. *Id.* at 902-03.

[14] *Id.* at 902. Though the Ryes were made defendants by their possession of the property, other parties made defendants due to possible interest resulting from being in the various chains of title included the Federal Land Bank of New Orleans, the Southern Royalty Company, Martha Rye Watkins, Winona Rye Freeman, Avonelle Rye Cole, Flora Nell Rye Dobbs, Neal Clement, Howard E. Stover, Estes Peeler Ledbetter, Dick P. Peeler, J. W. Young or his devises or heirs at law, and the Lowndes County Board of Education Trustees. *Id.* at 900-903.

[15] *Id.* at 902-03. The legal description of the concerned property is "[t]he E ½ of the SW ¼, and the SE ¼ of the NW ¼, and the West ½ of the NE ¼ of section 21, Township 15 South, Range 17 West." *Id.* at 902. Between March 7, 1955, when the property was conveyed as a part of a 3,750 acre tract from the Swamp Land Commission of Monroe County to a James A. Sullivan in fee simple, and 1961, when Carl and Gladys Rye received the last of three separate conveyances which constituted the concerned property, said property was subjected to approximately sixteen fee simple conveyances, two tax sales, one executor's sale, three lease arrangements, and three deeds of trust on which the trustee foreclosed and later sold. *Id.* at 902-03. There were two gaps in the

On appeal, the Board of Education presented four issues for argument.[16] The Mississippi Supreme Court affirmed the chancellor's rulings, however the court rejected the chancellor's rationale as a basis for its decision.[17] Instead, the court found persuasive that the facts raised a presumption of a grant from the state at some previous time.[18] The court noted that generally, the presumption of a grant from the sovereign arose only where there exists some prior defect in the chain of title.[19] However, in this instance, the presumption of a grant was sufficiently supported under Mississippi law where there existed open and continuous possession for an extended period of time and combined with other acts normally associated with ownership of the property even absent a defect in the chain of title.[20] In rejecting an argument

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chains of title noted by the court. *Id.* To complicate matters, portions of the property were at times simultaneously subjected to sales, conveyances, and leases. *Id.* The Board of Education's claim of title was based in a conveyance from Sullivan to the Board of Trustees of the Township 15 South, Range 17 West and its successor, which is the Monroe County Board of Education. *Id.* at 902.

[16] *Id.* at 903. The court considered for argument the issues that: (1) the 1867 Monroe County Board of Education as one of the grantees in the multiple chains of title had no authority to acquire real property; (2) the Ryes gained title by adverse possession; (3) the Board of Education, if it ever held title, lost such title by various tax sales; and (4) the Board of Education's claims were barred by the doctrine of latches as the Ryes had been in unchallenged possession for over thirty-five years. *Id.*

[17] *Id.* at 904. The chancellor held the Board of Education was without authority to hold title to the property or, in the alternative, that the Ryes or their predecessors had gained title by adverse possession. *Id.* The court did not fully address the issue of the Board's ability to hold title as trustee, but stated that the trust was valid even if the Board was not a proper trustee. *Id.* at 94 (citing, among others Board of Education of Itawamba County v. Logan, 405 So. 2d 122 (Miss. 1981)).

[18] *Id.* at 904. Specifically, the court found that, as the Ryes and their predecessors in title had paid applicable property taxes during the years in possession, then there was a presumption of a legal liability to pay such taxes, and the liability arose from some grant of title by the sovereign at some past time. *Id.*

[19] *Id.* at 906. Continuous and peaceable possession of property accompanied by the usual acts of ownership will support a claim against the state by a presumption of a grant. *Id.* (citing Caruth v. Gillespie, 109 Miss. 679, 68 So. 927 (1915)). The court reviewed Presley v. Haynes, 182 Miss. 44, 180 So. 71 (1938), in its discussion of the presumption of a grant operating to cure a defect or gap in the chain of title. *Monroe County*, 521 So. 2d at 906-07. *Presley* arose from an indemnity action on a warranty deed initiated when it was discovered that the chain of title was based on a void tax sale. *Presley*, 182 Miss. at 48-9, 180 So. at 71. The *Presley* court found the presumption of a grant from the state absolute where the continuous possession and use was concurrent with the state receiving the taxes on the property as if the property was privately owned. *Presley*, 182 Miss. at 50, 180 So. at 72.

[20] *Monroe County*, 521 So. 2d at 908. The court found guidance in three Arkansas cases; Baker v. Certain Lands in Independence County, 19 Ark. App. 253, 750 S.W. 2d

that the Ryes' possession amounted to adverse possession, the court took great care to distinguish the use of a presumption of a grant as being effective against the state, versus adverse possession which unavailable to divest the state of title to property.[21]

The court addressed a slightly similar issue in *McNeely v. Jacks*,[22] in which the plaintiffs sought a ruling that the defendants had blocked use of a public roadway.[23] From the chancellor's determination that the road in question was a public road which had been abandoned and his ruling dismissing the complaint, the plaintiffs appealed.[24] The Mississippi Supreme Court reversed, holding that the chancellor had erred as a matter of law in holding the road had been abandoned.[25] The court first noted that the concept of a claim by abandonment of a public road way is analogous to the concept of adverse possession against the public as record title holder.[26] Rejecting the arguments of the adverse claimants that their acts denied public access of the roadway to the public, the court found there was not sufficient evidence of non-use by the public to support the abandonment claim by the adverse possessors.[27] Additionally, the court determined that a roadway used by a

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318 (1986), Miller v. Kansas City S. Ry., 216 Ark. 304, 225 S.W. 2d 18 (1949), and Carter v. Stewart, 149 Ark. 189, 231 S.W. 887 (1921). *Monroe County*, 521 So. 2d at 908.

[21] *Monroe County*, 521 So. 2d at 906. The court first noted that the doctrine of presumption of a grant and adverse possession are similar, and that presumption of grant is available only if adverse possession is not a legally viable option to quiet title in the claimant. *Id.* (citing Gibson v. State Land Comm'n, 374 So. 2d 212, 216 (Miss. 1979), and Ittawamba County v. Sheffield, 195 Miss. 359, 13 So. 2d 649 (1943)).

[22] 526 So. 2d 541 (Miss. 1988).

[23] *McNeely*, 526 So. 2d at 542. Plaintiffs were owners of property accessible only by a east-west roadway which years before was a link between two major north-south roads. *Id.* at 542-43. Defendants owned the property located between plaintiff's land and the major road to the west. *Id.* at 543. The defendants had over time fenced their property leaving a gap for the roadway; later the gap was replaced with a gate installed by the plaintiffs. *Id.* The suit was perpetuated by the defendant's removal of the gate, and the installation of permanent fencing across the roadway. *Id.*

[24] *Id.* at 543-44. The court noted that the chancellor's opinion was directed to the arguments of the plaintiffs that the roadway had not been abandoned. *Id.* at 544 n.2. By way of footnote, the court noted that the plaintiff made no claim of right-of-way by prescription, easement, or way of necessity. *Id.*

[25] *Id.* at 545. Based on the record, the court held that at all times the road was a public right of way and had not been abandoned. *Id.*

[26] *Id.* at 544 (citing Roy v. Kayser, 501 So. 2d 1110, 1111 (Miss. 1987), Medina v. State *ex rel.* Summer, 354 So. 2d 779, 783 (Miss. 1977), and Picayune Wood Prod. Co. v. Alexander Mfg. Co., 227 Miss. 593, 86 So. 2d 480, 483 (1956)).

[27] *Id.* The defendants placed importance on the gates and other obstructions across the roadway as demonstrative of denying the public access to the roadway sufficient to constitute abandonment. *Id.* Noting there existed no law on point in Mississippi, the

limited number of people to reach their property, even if not used by the general public, will not support a claim for abandonment.[28]

Finally, the court addressed a similar issue concerning abandonment of property in *R & S Development, Inc. v. Wilson.*[29] In *R & S Development*, plaintiffs sought to enjoin defendant developers from converting an alley behind all the party's properties into a driveway to the developer's property.[30] At trial, the chancellor determined that the alley had been abandoned by the City of Jackson and that title to the alley reverted to the adjoining property owners.[31] The Mississippi Supreme Court held on appeal that the continuous, complete, and unexplained non-use of the alley by the general public for a period exceeding ten years created a presumption of abandonment by the city.[32] Further, the court found that the absence of dominion by the city and

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court found guidance in decisions from Indiana, Nevada, and Alabama. *Id.* (citing Smith v.Smith, 482 So. 2d 1172, 1175 (Ala. 1985) (gate or gap to control live stock does not cause road to lose its character as public way); Fenley Farms, Inc. v. Clark, 404 N.E. 2d 1164, 1170 (Ind. App. 1980) (road not abandoned by attempted obstruction); and Anderson v. Richards, 96 Nev. 318, 608 P.2d 1096, 1099 (1980) (unlawful encroachment on public roadway will not constitute abandonment)). The court found in the record sporadic use by persons other than the plaintiff of the roadway for various business and recreational purposes. *Id.* at 544-45.

[28] *Id.* at 545. The court held as immaterial that the roadway may have only been used by limited persons to gain access to their property as those persons were still members of the public whose use would defeat claims of abandonment or adverse possession. *Id.* The court further noted that the limited use of the roadway, regardless of by whom, appeared from the record to have always been with the defendant's permission. *Id.* Such lack of denial of permission provided further basis against the abandonment claim of the defendants. *Id.*

[29] 534 So. 2d 1008 (Miss. 1988).

[30] *R & S Development*, 534 So. 2d at 1010. The four separate parties involved all owned property adjacent to the alley in question. *Id.* The defendant, R & S Development, owner of one of the properties, began construction of a duplex on the property. *Id.* R & S planned to use the ally for ingress and egress to the duplex property. *Id.* The plaintiffs, owners of the three remaining properties, began this action when R & S hired B & S Services to bulldoze the alley. *Id.* The bulldozing caused damage to the remaining owner's activities which had, over the years, extended into the alley. *Id.*

[31] *Id.* at 1009. The chancellor awarded plaintiffs actual and punitive damages as a result of the bulldozing of the alley. *Id.*

[32] *Id.* at 1010. The court noted the alley had never been used by the City of Jackson for any purpose. *Id.* Further, the record reflected that one plaintiff had extended his garage half way into the alley, another plaintiff had planted dogwoods and azaleas, and another plaintiff had planted ornamental shrubs and trees in the alley. *Id.* at 1010-11. The court cited the previous decision of McNeely v. Jacks, 526 So. 2d 541, 544 (Miss. 1988) to note the trend of Mississippi law provided that protracted non-use of a public right of way for an extended period of time would support common law abandonment of that public way. *R & S Development*, 534 So. 2d at 1011.

the city's acquiescence in the previous modifications to the alley way supported an intent by the city to abandon the alley.[33] The court found that the strong presumption of abandonment in favor of the adjoining property owners was not overcome by the evidence presented by the defendants.[34]

II. Statutory Interpretations

During 1988, the Mississippi Supreme Court issued two opinions which provided interpretation of two state statutes. In *Pursue Energy Corp. v. State Oil and Gas Board*,[35] the court decided whether interest expense associated with drilling wells could be apportioned among other mineral interest owners.[36] Various oil and mineral interests had previously been force-pooled by the State Oil and Gas Board.[37] Pursue

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[33] *R & S Development*, 534 So. 2d at 1011. The court found persuasive that the city had not used or exercised control over the alley for over 30 years, that the city chose not to defend the city's right to the alley, and that the city had not objected to the plaintiff's previous personal use or construction in the alley way. *Id.* Further, the city engineer had advised R & S Development to obtain the permission of the adjoining land owners before bulldozing in the alley. *Id.*

[34] *Id.* at 1011. As the presumption of abandonment withstood R & S Development's attack, the court upheld the chancellor's ruling that title to the alley reverted to the adjacent property owners who took to the centerline of the alley. *Id.*

[35] 524 So. 2d 569 (Miss. 1988).

[36] *Pursue Energy*, 524 So. 2d at 569.

[37] *Id.* By Miss. Code Ann. § 53-3-7, multiple leasehold interest in the subject oil field had been force-pooled in response to a petition to the State Oil and Gas Board filed by Pursue Energy Corp. *Pursue Energy*, 524 So. 2d at 569. Miss. Code Ann. § 53-3-7 states in part,

> (a) when two or more separately owned tracts of land are embraced within an established drilling unit, the person owning the drilling rights therein and the rights to share in the production therefrom may validly agree to integrate their interests and to develop their lands as a drilling unit. Where, however, such persons have not agreed to integrate their interests, the board may, for the prevention of waste or to avoid the drilling of unnecessary wells require such persons to integrate their interests and to develop their lands as a drilling unit. . . .
>
> In the event such pooling is required, *the cost of development and operation of the pooled unit chargeable by the operator to the other interested owner or owners shall be limited to the actual expenditures required for such purpose, not in excess of what are reasonable*, including a reasonable charge for supervision. When production of oil or gas is not secured in paying quantities as a result of such forced unitization, the operator shall have no charge against the nonconsenting owner or owners. *In the event of any dispute relative to, such costs, the board shall determine the proper costs, after due notice to all interested parties and hearing thereon.* Appeals may be taken from such determination as from any other order of the board. (Emphasis added).

Energy, as the designated operator, apportioned interest expense to the non-consenting owners as an actual cost of operation.[38] On appeal, Pursue Energy argued that Mississippi Code Annotated section 53-3-7 (1972) allowed interest expense to be apportioned.[39] The Mississippi Supreme Court, rejecting Pursue Energy's arguments, held that interest expense was not specifically allowed by section 53-3-7 and that the stated interest expense was not a necessary expense of drilling which could be legitimately charged off to the pooled mineral interest owners.[40]

In *Oktibbeha County Board of Education v. Town of Sturgis*,[41] the court addressed the validity of certain sixteenth section land leases. The Board of Education brought action to confirm title and to cancel certain conveyances as clouds on the title.[42] The Town of Sturgis claimed a lease hold interest from a ninety-nine year lease executed in 1945.[43] From a lower court decision confirming the ninety-nine year

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MISS. CODE ANN. § 53-3-7 (1972).

[38] *Pursue Energy*, 524 So. 2d at 569-70. Pursue was allowed by the Board's order, to charge off the interest as a proper cost within the meaning of section 53-3-7. *Id.* at 569.

[39] *Id.* at 570. Pursue argued that all costs which were "reasonable, necessary, and actually incurred" were by statute subject to proration and recoverable from the production attributable to the pooled interest. *Id.*

[40] *Id.* at 571. The court accepted the arguments of the complaining force-pooled non-consenting interest, Shell Western and 3300 Corp. *Id.* The court characterized the question as one of the definition of cost of development. *Id.* The court stated that interest expenses were not included in Miss. Code Ann. § 53-3-7, as the statute allowed only for the recovery of cost of development and operation. *Pursue Energy*, 524 So. 2d at 572. Additionally, the court noted that interest expense was not a necessary cost of business, stating that it was "not physically necessary to borrow money in order to extract minerals." *Id.* at 571.

[41] 531 So. 2d 585 (Miss. 1988).

[42] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 586. The Oktibbeha Board of Education claimed that the subject property had been improperly leased by the Oktibbeha County Board of Supervisors in 1945 for a ninety-nine year term. *Id.*

[43] *Id.* The Town of Sturgis defended as the successors to the original leaseholder. *Id.* The controversy arose from the execution of a lease after the passage of the February 4, 1944, amendment to Miss. Const. section 211, which then read

> *The Legislature shall enact such laws* as may be necessary to ascertain the true condition of the title to the Sixteenth Section lands in this state, . . ., *and shall* provide that the Sixteenth Section lands reserved for the support of township schools shall not be sold nor shall they be leased for alonger term than ten years for lands situated outside municipalities *and for lands situated within municipalities for a longer term than 99 years, for a gross sum*; provided further than existing leases of the Sixteenth Section lands situated in the municipalities of the state may, for a gross sum, be extended for a term of years not exceeding 99 years from the date of such extension,. . . . (emphasis added).

lease, the Board appealed.[44] The Mississippi Supreme Court reversed, holding that sixteenth section land leases for a ninety-nine year period executed prior to enabling legislation were not valid.[45] The court found that, though such leases were authorized under a Mississippi Constitutional amendment in 1944, the amendment was not self-executing and required legislative action to make possible ninety-nine year leases.[46]

III. Conveyances

The Mississippi Supreme Court addressed the interpretation of a mineral deed in *Thornhill v. System Fuels, Inc.*[47] The subject deed conveyed to Thornhill an undivided one-half interest in any minerals located on the specified property, but excepted the grantee from participating in any present or future lease rentals or bonuses.[48] After wells drilled by System Fuels began producing, Thornhill and those claiming though him filed suit alleging that the deed conveyed a one-half mineral interest subject to the grantor's reserved rights to delay rentals and bonuses.[49] System Fuels answered that the deed conveyed only a non-participating royalty interest, with the grantor reserving the right to delay payments, bonuses from leases, and concurrent right to make leases.[50] The chancellor found for System Fuels, on the basis of *Harris v. Griffith*;[51] Thornhill appealed.[52] The Mississippi Supreme

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Miss. Const. § 211 (amend. 1944). However, the lease was executed prior to the April 10, 1946 change to Miss. Code § 6597 (1942) which provided for such ninety-nine year leases. *Oktibbeha County Bd. of Educ.* 531 So. 2d at 586.

[44] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 586. The chancellor determined that the constitutional amendment was sufficient to authorize ninety-nine year leases, finding that the amendment was self executing and therefore not requiring a conforming legislative enactment. *Id.* at 587.

[45] *Id.* at 589. The court found that the subject amendment to Miss. Const. § 211 did not confer rights to individuals but only provided for the legislature to pass statutes to effectuate its provisions. *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 588.

[46] *Oktibbeha County Bd. of Educ.*, 531 So. 2d at 588. The court distinguished self-executing amendments to the constitution as ones which by their plain language "grants a distinct right. . . and requires no legislation to effectuate it." *Id.*

[47] 523 So. 2d 983 (Miss. 1988).

[48] *Thornhill*, 523 So. 2d at 984-85. The deed was executed in 1945. *Id.* at 984.

[49] *Id.* at 985. In essence, the Thornhill claim was that the conveyance was one of an undivided one-half interest in the minerals. *Id.* at 992.

[50] *Id.* at 985. The court characterized this claim as one of a non-participating royalty transfer. *Id.* at 992.

[51] 210 So. 2d 629, 635 (Miss. 1968) (reservation of bonuses and rentals along with other terms constitute implied retention of executive rights).

[52] *Thornhill*, 523 So. 2d at 985. The court stated the determining issue to be the character of the conveyance. *Id.*

Court reversed and rendered judgment, holding that the grant of an entire interest in minerals conveys all incidents of ownership thereto that are not specifically excepted or reserved.[53] *Harris v. Griffith* was expressly overruled.[54]

In *C & D Investment Co. v. Gulf Transport Co.*,[55] the Mississippi Supreme Court articulated an exception in the application of the rule of perpetuities. C & D and Gulf Transport entered, as part of a master agreement, a contingent agreement which provided for the possible conveyance of a property from Gulf Transport to C & D.[56] Eleven years later, Gulf Transport conveyed the property, which was the subject of the contingency agreement, to a third party.[57] C & D sought specific performance of the past agreements; however the chancellor dismissed the action pursuant to Mississippi Rules of Civil Procedure 12 (b)(6).[58] The Mississippi Supreme Court, on appeal, reversed and remanded, holding that the wait and see exception to the rule against perpetuities was applicable in Mississippi.[59] The court noted that by the wait and see doctrine, if the required contingency for an interest to vest actually happens during the perpetuities period, then the future

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[53] *Id.* at 992. The court found that the reservation by the grantor of all rights to bonuses and delay rentals from oil and gas leases did not carry with it by implication any other incidents of ownership. *Id.*

[54] *Id.* The court stated that Harris v. Griffith, 210 So. 2d 629 (1968), which was based on similar facts, erred in concluding that there was a reservation of executive rights where there was a reservation of bonuses and delay rentals. *Thornhill*, 523 So. 2d at 922.

[55] 526 So. 2d 526 (Miss. 1988).

[56] *C & D Inv. Co.*, 526 So. 2d at 527-28. The master agreement provided for the planned use of properties owned between the two parties. *Id.* at 527. The agreement provided that if Gulf Transport conveyed away certain properties, then a twenty-five foot strip of land adjacent to C & D's property would be conveyed to C & D for ingress and egress to C & D's property. *Id.* This agreement was recorded in the land records of the chancery clerk's office. *Id.*

[57] *Id.* at 528. Gulf Transport conveyed property, including the twenty-five foot strip, to its parent corporation by warranty deed. *Id.* By various conveyances, the subject property was finally deeded to a construction company which built their offices on the site. *Id.*

[58] *Id.* at 528. The chancellor found the master agreement uncertain such that a practical remedy could not be supported, the agreement failed to recite adequate consideration, and the agreements did not contain an adequate description of the property to be conveyed. *Id.* Further the chancellor stated that the master agreement violated the rule of perpetuities. *Id.*

[59] *Id.* at 529-30. The court noted a previous decision indicating that Mississippi had adopted the wait and see doctrine. *Id.* at 529.

interest is held to be valid.[60] The court noted that Mississippi followed the minority of jurisdictions in adhering to the wait and see doctrine.[61]

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[60] *Id.* at 529. The court found that the required contingency, the conveyance of the subject adjacent property, occurred when Gulf Transport conveyed that property to a third party, and therefore the interest of C & D in the twenty-five foot strip had vested. *Id.* at 530.

[61] *Id.* at 529.

TORTS

In 1988, the Mississippi Supreme Court rendered decisions in the area of torts law concerning false imprisonment,[1] strict liability,[2] medical malpractice,[3] negligence,[4] statutes of limitation,[5] actionable words,[6] libel,[7] bad faith,[8] and premises liability.[9] The decisions which had sig-

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[1] Godines v. First Guar. Sav. & Loan Ass'n, 525 So. 2d 1321, 1325 (Miss. 1988) (where there remained factual disputes with regard to whether defendants instigated plaintiff's detention, summary judgment was premature).

[2] Hall v. Miss. Chem. Express, 528 So. 2d 796, 800 (Miss. 1988) (manufacturer was not negligent as matter of law where plaintiff failed to prove that product was not reasonably fit for its intended use or that without additional safety device product was rendered unreasonably dangerous).

[3] Bell v. West Harrison County Dist., 523 So. 2d 796, 800 (Miss. 1988) (failure of nurse to raise rails on patient's bed is medical decision, and two-year medical malpractice statute of limitations applies); Jenkins v. Forrest County Gen. Hosp., 538 So. 2d 1162 (Miss. 1988) (judge should recuse himself where his relative is senior partner in firm representing party to suit and where medical community assisted in electing judge); Walker v. Skiwski, 529 So. 2d 184, 187 (Miss. 1988) (where plaintiff offered no expert testimony concerning competence and skill with which surgical procedure was performed, summary judgment was appropriately entered).

[4] Hood v. Oakley, 519 So. 2d 1236, 1238-39 (Miss. 1988) (admission of evidence of citations given to plaintiff for public drunkenness was not reversible error where there was other testimony pertaining to plaintiff's intoxication and mitigating jury instructions were given); Wood v. Taylor Mach., Inc., 529 So. 2d 606, 610 (Miss. 1988) (under Tennessee law, specific nature of harm to plaintiff need not have been foreseen; it is sufficient if some harm of general type of that which occurred is reasonably foreseeable as result of defendant's failure to exercise due care).

[5] Moore v. Jesco, 531 So. 2d 815, 817 (Miss. 1988) (statute of limitations period for damages from improvements to real property begins to run on written acceptance or actual occupancy, whichever occurred first).

[6] Isaacks v. Reed, 537 So. 2d 409, 410-11 (Miss. 1988) (Actionable Word Statute is applicable only to spoken words).

[7] Johnson v. Delta Democrat Publishing Co., 531 So. 2d 811, 813 (Miss. 1988) (for defamation action to lie, two requirements must be met: "words used must have been clearly directed toward plaintiff and defamation must be clear and unmistakable from words themselves and not product of innuendo, speculation or conjecture"); Blake v. Gannett Co., 529 So. 2d 595, 606 (Miss. 1988) (where plaintiff was private figure, but published statements of which he complained were true or protected opinion or not clearly directed toward plaintiff, action for libel and false light invasion of privacy must fail).

[8] Stamps v. Estate of Watts, 528 So. 2d 812, 814-15 (Miss. 1988) (where insruance company had sought judicial determination by interpleader of division of uninsured motorist proceeds, summary judgment in favor of insurance company on issue of bad faith was appropriate).

nificant impact on the status of Mississippi tort law will be discussed textually.

I. INTERSPOUSAL IMMUNITY

In *Burns v. Burns*,[10] a divided Mississippi Supreme Court abolished interspousal immunity.[11] Betty Burns sued her husband Erit Lamar Burns to recover for injuries she received from an alleged assault and battery.[12] The trial court, on motion for judgment on the pleadings, dismissed the complaint as barred by the doctrine of interspousal immunity.[13]

The majority based its decision to abolish the common law doctrine on the lack of continued vitality of the reasons traditionally given as justification for the doctrine: (1) The common law concept of unity between husband and wife was said by the majority to be based on the ancient concept of the wife as chattel to her husband; further, it was said to be inconsistent with the Mississippi Constitution.[14] (2) In considering the idea that interspousal immunity promotes domestic tranquility, the majority argued that matrimonial tranquility is destroyed not by the filing of a lawsuit, but by the commission of the tort.[15] (3) The majority likewise dismissed the argument that interspousal immunity acts to discourage fraudulent and collusive claims.[16] The court expressed confidence that the judicial system could ascertain the existence of fraudulent and collusive claims.[17]

Justice Griffin, joined by three other justices, wrote a strong dissent.[18] The dissent argued that if there were a need to change the rule, the legislature should change it, rather than the courts.[19] Other reasons

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[9] Jerry Lee's Grocery v. Thompson, 528 So. 2d 293, 295-96 (Miss. 1988) (overturning jury verdict for plaintiff where there was no evidence that dangerous condition which caused plaintiff's injury was caused by store employees' negligence or that defendant had either actual or constructive knowledge of condition).

[10] 518 So. 2d 1205 (Miss. 1988).

[11] *Burns*, 518 So. 2d at 1211. The court noted that 44 states have either fully or partially abrogated the doctrine. *Id.* at 1208-09.

[12] *Id.* at 1206.

[13] *Id.*

[14] *Id.* at 1209-10. The Mississippi Constitution states, "All courts shall be open; and every person for an injury done him in his . . . person . . . shall have a remedy by due course and right . . . ." MISS. CONST. art. III, § 24.

[15] *Burns*, 518 So. 2d at 1210.

[16] *Id.* at 1210-11.

[17] *Id.* at 1211.

[18] *Id.* at 1213 (Griffin, J., dissenting).

[19] *Id.* (Griffin, J., dissenting).

given for the dissenting justices' belief that the immunity should be continued included public policy related to marriage, the concern that abolition of the immunity would cause a proliferation of fraudulent and collusive actions with consequent overburdening of the court system, and a belief that the divorce courts and criminal courts furnish ample redress to the aggrieved spouse.[20]

II. Damages

In *Whittley v. City of Meridian*,[21] the Mississippi Supreme Court modified the procedure used to determine the damages due to a plaintiff where co-defendants or joint tortfeasors are involved and one of the defendants has settled with the plaintiff.[22] In *Whittley*, the plaintiff, a minor, was rendered a quadriplegic when a refuse bin fell on her.[23] Two defendants settled with the plaintiff for a sum of $2,544,276.[24] In the suit against the city of Meridian, the jury was informed of the settlement.[25] The jury returned a verdict in favor of the city.[26]

Prior case law recognized two acceptable methods for determining damages where one co-defendant had settled with the plaintiff.[27] One method allowed defendant to produce evidence that a settlement had been reached with one or more of the defendants and to inform the jury of the amount of that settlement.[28] The jury, under this procedure, was then instructed that if it returned a verdict for plaintiff, the amount of the award would be reduced by the amount of the previous settlement.[29] Under the second procedure, the jury would not be informed of the amount of the settlement.[30] If the jury's verdict were for the plaintiff, the judge would reduce the amount of the award by the amount of the settlement previously reached with the other defendant or defendants.[31]

In *Whittley*, the petitioner appealed the use of the method

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[20] *Id.* at 1216. (Griffin, J., dissenting).
[21] 530 So. 2d 1341 (Miss. 1988).
[22] *Whittley*, 530 So. 2d at 1346.
[23] *Id.* at 1343.
[24] *Id.* at 1342.
[25] *Id.* at 1345.
[26] *Id.* at 1342.
[27] Garcia v. Coast Elec. Power Ass'n, 493 So. 2d 380, 385 (Miss. 1986).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* The *Garcia* court indicated a preference for the second procedure, but held that the use of either method would not constitute reversible error. *Id.*

whereby the jury was informed of the amount of the settlement.[32] The Mississippi Supreme Court held that the jury may not be informed of the amount of the settlement.[33] If the verdict were for the plaintiff, the judge should reduce the verdict by the amount of the settlement.[34] The court reasoned that a jury would be unnecessarily influenced in its decision if it were informed of the amount of a settlement with a co-defendant or a joint tortfeasor.[35] The court also concluded that to inform the jury of the amount of a structured settlement would mislead them because of the need to consider the present cash value of the settlement, rather than the total flow of income over a period for time.[36]

III. Expert Witnesses

At issue in *Miller v. Stiglet, Inc.*[37] was the propriety of expert testimony of police officers and the extent to which an expert in accident reconstruction may be permitted to give his opinion.[38] The litigation in *Miller* grew from an automobile accident, which the plaintiff charged was caused by sand or paint that had been left by Stiglet, Inc. on the bridge where the accident occurred.[39]

At trial, two highway patrol officers were permitted to testify as experts in the field of accident reconstruction.[40] They concluded that the causes of the accident were the slick condition of plaintiff's tires, a wet roadway, and plaintiff's excessive speed.[41]

On appeal, the Mississippi Supreme Court concluded that an officer's expert opinion of the cause of an accident is admissible to the

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[32] *Whittley*, 530 So. 2d 1345.

[33] *Id.* at 1346.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] 523 So. 2d 55 (Miss. 1988).

[38] *Miller*, 523 So. 2d at 58. The trial was held before the effective date of the new Mississippi Rules of Evidence, but the Mississippi Supreme Court stated that the holding would be the same under the new rules. *Id.*

[39] *Id.* at 56.

[40] *Id.* at 57-58. The first patrolman stated that he had studied accident reconstruction and accident investigation, held a certificate of graduation from the Northwestern Traffic Institute Accident Investigation School, and had investigated between 400 and 600 accidents. *Id.* at 57. The second patrolman had received accident investigation instruction at the Mississippi Highway Patrol Academy and the Northwestern Traffic Institute, as well as from other instructors, and had investigated over a thousand accidents. *Id.*

[41] *Id.* at 57-58.

same extent as the opinion of any other accident reconstructionist.[42] The court reasoned that allowing a qualified police officer to testify as an expert was consistent with Rule 702 of the Mississippi Rules of Evidence.[43] The court disagreed with the contention that jurors necessarily give more credence to the testimony of an officer of the law than they would give to the testimony of others.[44] Holding that the trial court properly ruled that the patrolmen's knowledge, skill, experience, training, and education were adequate for them to be qualified as experts, the court stated that the officers' testimony as to the cause of the accident was properly admitted.[45]

The court cautioned, however, that "the trial judge, in a case such as this, should determine whether the qualifications as an accident reconstructionist include expertise in retroactively determining speed. An expert witness must be qualified in whatever field of scientific knowledge to which his expert testimony is related."[46] The court concluded that any error in admitting testimony concerning speed was harmless in this case due to the "overwhelming evidence in support of the verdict."[47]

IV. Learned Intermediary Doctrine

In *Wyeth Laboratories, Inc. v. Fortenberry*,[48] the Mississippi Supreme Court adopted the learned intermediary doctrine.[49] The litigation in *Fortenberry* arose after Billy Joe Fortenberry was inoculated with an influenza vaccine.[50] The treating physician testified at trial that he had read the package insert which warned of possible adverse reactions to the vaccine,[51] but that he considered the risks to be remote

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[42] *Id.* at 60.

[43] *Id.* Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Miss. R. Evid. 702.

[44] *Miller*, 523 So. 2d at 59.

[45] *Id.* at 60.

[46] *Id.*

[47] *Id.* In dissent, Justice Hawkins, joined by Justice Griffin, objected that one officer, who had testified to the speed of the car as it went onto the bridge, showed no qualification to enable him to make such a determination. *Id.* at 62 (Hawkins, J., dissenting).

[48] 530 So. 2d 688 (Miss. 1988).

[49] *Fortenberry*, 530 So. 2d at 693.

[50] *Id.* at 689.

[51] *Id.* The court quoted some of the language in the package insert:

> Indications and Usage . . .
>
> Annual routine influenza immunization is NOT recommended for healthy

and refrained from warning his patients because he believed that such a warning would unnecessarily frighten them.[52]

Approximately five days after the inoculation, Fortenberry was stricken with transverse myelitis.[53] There was conflicting testimony at trial as to whether there existed a causal relationship between the administration of the vaccine and Fortenberry's illness.[54]

The jury returned a verdict for the physician and against Wyeth.[55] The Mississippi Supreme Court held that, as a matter of law, Fortenberry failed to prove causation.[56] In doing so, the court adopted the learned intermediary doctrine.[57] This doctrine states that pharmaceutical companies must warn only the prescribing physician of any potential dangers of a prescription drug.[58] The physician then becomes a learned intermediary, who must make an informed medical judgment whether to pass the warning to his patients.[59] The court stated, however, that the pharmaceutical company has a duty to warn the consumer where there is no physician functioning as a learned

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> adults, infants, or children but is strongly recommended for all persons, children and adults, who are at increased risk of adverse consequences from infections of the lower respiratory tract. . . .
>
> ADVERSE REACTIONS . . .
>
> 3. Guillane-Barre syndrome (GBS). This is an uncommon illness characterized by ascending paralysis which is usually self-limiting and reversible. . . . Before 1976, no association of GBS with influenza use was recognized. . . . A statistically significant excess risk of contracting GBS after receipt of the 1978-79 or 1979-80 Influenza Virus Vaccine could not be demonstrated . . . . Nevertheless, candidates for influenza Virus Vaccine should be made aware of the benefits and possible risks, including GBS, of administration.
>
> Other neurologic disorders, including encephalopathies, not defined as GBS, have been temporally associated with influenza vaccination.

Id. at 689 n.1.

[52] *Id.* at 689.

[53] *Id.* Fortenberry's symptoms included impotency, incontinence, and temporary paralysis. *Id.*

[54] *Id.* at 689-90. Wyeth Laboratories, on appeal, questioned the admissibility of the testimony of a biochemist who testified for Fortenberry. *Id.* at 690. The biochemist stated with medical certainty that there was a causal relationship between the symptoms and the vaccine. *Id.* at 689. The Mississippi Supreme Court held that the determination by the trial judge that the biochemist's knowledge and training qualified him as an expert witness was not an abuse of discretion. *Id.* at 690.

[55] *Id.* at 689. The verdict for the physician was not part of this appeal. *Id.* at 693.

[56] *Id.* at 693.

[57] *Id.*

[58] *Id.* at 696.

[59] *Id.* at 691.

intermediary.[60]

On the facts of this case, the court held that the warning furnished by Wyeth on the package insert was adequate as a matter of law,[61] and that the intervening role of the physician as a learned intermediary prevented a finding of liability on the part of the drug manufacturer.[62]

V. Sovereign Immunity

A. Qualified Public Official Immunity

In 1988, the Mississippi Supreme Court addressed the confusing issues surrounding sovereign immunity in Mississippi. The first case addressed by the Mississippi Supreme Court was *Marshall v. Chawla*.[63]

In *Marshall*, Wesley Marshall was taken by his wife to the Kuhn Memorial State Hospital emergency room after he became violently ill with a severe headache and vomiting.[64] The emergency room staff called the physician on duty, Dr. Anwant Chawla, and the physician instructed the staff to administer dramamine to the plaintiff.[65] However, the physician did not come to the emergency room to examine Marshall, and Marshall was released soon thereafter without further treatment.[66] Ten hours later the plaintiff suffered a stroke and died.[67]

The plaintiffs then filed suit against the Board of Trustees of the State Eleemosynary Institutions, the hospital supervisors, charging them with the negligence which caused Marshall's death.[68] The trial court nonetheless granted the defendant's motion to dismiss based on the ground of sovereign immunity.[69] The plaintiffs appealed to the

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[60] *Id.* at 692.

[61] *Id.* at 693. Excerpts of the language of the insert are quoted *supra* at note 46. The warning further stated that patients "should be made aware of the benefits and risks, including GBS, of administration." *Id.* at 693.

[62] *Id.*

[63] 520 So. 2d 1374 (Miss. 1988).

[64] *Marshall*, 520 So. 2d at 1374. The plaintiffs were the surviving heirs of the late Wesley Marshall. *Id.*

[65] *Id.*

[66] *Id.* After Marshall was administered dramamine, he was released without further treatment. *Id.*

[67] *Id.* The court in *Marshall* was forced to determine whether under traditional common law principles of sovereign immunity, physicians on staffs of state eleemosynary institutions were immune from all liability for their negligence due to the discretionary character of their duties. *Id.* at 1375, 1377.

[68] *Id.* at 1374-75.

[69] *Id.* at 1375. The hospital supervisors were dismissed on the ground that they were acting in the exercise of duties where discretion and decision-making were required. *Id.*

Mississippi Supreme Court, and the appeal involved only the issue of whether Dr. Chawla was protected from liability by the doctrine of "sovereign immunity" or by the "qualified immunity given to public officials" acting in a discretionary capacity within the scope of their duties.[70]

Before resolving this issue, the court first explained that this case did not involve sovereign immunity at all, since that doctrine applied in a strict sense only to state government and its subdivisions, rather than to their individual employees.[71] However, the court continued by stating that Mississippi public officials enjoyed a qualified immunity for injuries inflicted by them while acting within the scope of their duties,[72] and that Mississippi has applied a distinction between discretionary and ministerial duties of officials when imposing liability.[73] Simply stated, officials were to be protected from suit if acting in a discretionary capacity.[74] A ministerial duty was defined by the court as the following:

> one that has been positively imposed by law and its performance required at a time and manner or upon conditions which

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The trial court then granted Dr. Chawla's motion to dismiss on the basis of sovereign immunity and announced that it was relying upon Hudson v. Rausa, 462 So. 2d 689 (Miss. 1984). *Marshall*, 520 So. 2d at 1375.

[70] *Marshall*, 520 So. 2d at 1375. The plaintiffs appealed only as to Dr. Chawla, and the other defendants were not parties to the appeal. *Id.*

[71] *Id.* The only defendant on appeal was the individual employee, Dr. Chawla, and therefore, the doctrine of qualified public official immunity was in issue, not sovereign immunity. *Id.* However, if this case had involved the state government or its subdivisions, the plaintiff's action would have been governed by traditional common law immunities because the action accrued in 1980. *Id.* The landmark decision of Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), abolished sovereign immunity for cases accruing after July 1, 1984, and cases accruing before that date were to be governed by the traditional common law immunities unaffected by *Pruett*. *Marshall*, 520 So. 2d at 1375.

[72] *Marshall*, 520 So. 2d at 1375. Individual employees, such as Dr. Chawla, were found by the court to be protected under the common law public official qualified immunity as opposed to sovereign immunity. *Id.* the court continued in explaining that Mississippi, like many other states, had applied a distinction between the "discretionary" and the "ministerial" duties of public officials. *Id.* However, the court found that only a minority of jurisdictions adhered to Mississippi's approach of absolute immunity from liability for doctors in public service for negligence on account of the discretionary character of their duties. *Id.* at 1376. The court stated that some courts had disposed of this absolute immunity issue in a summary fashion, while others had resolved this issue according to the "Michigan rule that medical decision making was inherently discretionary." *Id.*

[73] *Id.*

[74] *Id.*; *see* Karpors v. Mississippi, 633 F.2d 640, 647 (5th Cir. 1981).

> are specifically designated, the duty to perform under conditions specified not being dependent upon the officer's judgment or discretion, the act being discharged thereof is ministerial.[75]

If the act did not fit this definition, then the court reasoned that it was presumably discretionary, which resulted in a broad application of sovereign immunity.[76] In determining whether Dr. Chawla's act constituted a discretionary act or ministerial act, the court found that in the case of medical doctors in public service, special circumstances were present which rendered a broader grant of immunity to be a sound policy.[77] The court further explained that the failure to provide a qualified immunity from tort liability to government doctors could serve to deter them from entering governmental service.[78] Thus, the court reaffirmed the immunity enjoyed by physicians on the staff of state eleemosynary institutions in affirming the dismissal of Dr. Chawla from the suit.[79]

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[75] *Marshall*, 520 So. 2d at 1375 (citing Poyner v. Gilman, 171 Miss. 859, 864-65, 158 So. 922, 923). The court continued to state that the prevailing test for the classification of ministerial deeds was set forth in Poyner v. Gilmore, 171 Miss. 859, 158 So. 922 (1935). *Marshall*, 520 So. 2d at 1375.

[76] *Marshall*, 520 So. 2d at 1375; *see* Hudson v. Rausa, 462 So. 2d 689, 695-96 (Miss. 1984) (illustrating a brad application of sovereign immunity where physician for State Board of Health was protected by sovereign immunity when he prescribed drug to treat tuberculosis which produced hepatitis as side effect).

[77] *Marshall*, 520 So. 2d at 1375-76. The *Marshall* court recognized that the case of *Hudson v. Rausa* came very close to establishing that "all medical decisions would be immunized from suit if they occurred in the context of a state institution because the administration of medical treatment involves the exercise of considerable professional judgment and its discretion . . .". *Id.* (quoting *Hudson*, 462 So. 2d at 695-96).

[78] *Id.* at 1376. The plaintiffs unsuccessfully argued that *Hudson* was distinguishable from the case at bar by the fact that the physician in *Hudson* was a health department official. *Id.* Alternatively, the court in *Marshall* explained that *Hudson* specifically found that a physician was immunized for particular acts of medical treatment. *Id.* Additionally, the court rejected the plaintiffs' argument that the discretion exercised by a doctor in the normal practice of medicine was not the type which immunized a doctor in public service from personal liability. *Id.* However, the court recognized that most jurisdictions had not squarely confronted the issue of whether a doctor in public service was immunized from all liability for negligence on account of the discretionary nature of his duties. *Id.* The court nonetheless adhered to the view of absolute immunity which constitutes the view of a minority of jurisdictions. *Id.* In justifying its grant of absolute immunity from the liability of negligence on account of the discretionary character of Dr. Chawla's duties, the *Marshall* court explained that the vulnerability of liability would deter doctors from entering government service in the first place. *Id.* at 1377. The protection of qualified immunity thus acted as a strong incentive to encourage doctors to serve in state eleemosynary institutions. *Id.*

[79] *Id.* In dismissing the aciton, the court found *Hudson* controlling. *Id.* The court

B. *Sovereign Immunity as to the State and Political Subdivisions*

The case of *Grantham v. Mississippi Department of Corrections*[80] was decided the same day as *Marshall*, and it also addressed the issue of sovereign immunity.[81] In *Grantham*, the court faced the perils of the defects in our parole system, and the cold reality that the system was immune from suit.[82] The plaintiff[83] in *Grantham* was assaulted, attacked, and almost kidnapped by Clem Jimpson in the parking lot of the bank where she was employed.[84] When the plaintiff screamed for help, she was shot and permanently paralyzed from the neck down as a result.[85] Clem V. Jimpson had been paroled approximately five weeks earlier, after having served twelve years and three months of a life sentence for the murder of a convenience store clerk.[86]

The plaintiff thereafter filed suit against the Mississippi Department of Corrections, and members of the Mississippi Parole Board, in their individual and official capacities, and the former Commissioner of the Mississippi Department of Corrections, in his individual and for-

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noted that the legislature could have implicitly created state tort liability by prescribing specific duties of individual state employees. *Id.* However, no such statute was found to exist for state medical employees. *Id.* (citing Grantham v. Mississippi Dept. of Corrections, 522 So. 2d 219 (1988)).

[80] 522 So. 2d 219 (Miss. 1988).

[81] *Grantham*, 522 So. 2d at 219. *Grantham* addressed whether sovereign immunity extended to the Mississippi Parole Board and to the Department of Corrections. *Id.* The court additionally faced the doctrine of qualified public official immunity in its application to Parole Board members and to the Commissioner of the Mississippi Department of Corrections. *Id.*

[82] *Id.* at 223-26. The court determined that the Parole Board, Department of Corrections, and Commissioner of Corrections were immune from suit, even though the allegations against the Parole Board members were found to be sufficient to pierce the shield of their qualified immunity to suit. *Id.* at 226.

[83] *Id.* at 220. The plaintiff was Linda Grantham. *Id.* On February 12, 1985, Linda Grantham was returning from lunch to her job as Assistant Vice President of Deposit Guaranty National Bank in Jackson when the incident which gave rise to his case occurred. *Id.*

[84] *Id.* The plaintiff was approached by Clem Jimpson in the parking lot of the Raymond-Terry Road Branch Bank. *Id.*

[85] *Id.* at 221. The court noted that Grantham had instituted an action against Jimpson in tort, but also recognized that the action was of little value due to Jimpson's economic status. *Id.*

[86] *Id.* at 221. The plaintiff alleged in an amended complaint that Jimpson and seventy-two other inmates were approved for parole and released the same day. *Id.* The plaintiff further alleged that the defendants had approved Jimpson's release without reviewing all of the pertinent information as required by § 47-7-17 of the Mississippi Code (1972). *Id.* at 221.

mer official capacity.[87] The plaintiff alleged that by paroling and releasing Jimpson, the defendants acted arbitrarily, negligently, and with reckless disregard for the safety of society in general, and herself in particular.[88] However, the circuit court dismissed her complaint on immunity grounds, and the plaintiff then appealed to the Mississippi Supreme Court.[89]

On appeal, the Mississippi Supreme Court explained that the plaintiff's complaint was to be tested, via motion to dismiss for failure to state a claim, substantially by reference to Rules 8(a) and (e) of the Mississippi Rules of Civil Procedure.[90] Thus, in order to dismiss for failure to state a claim, the court was required to determine with reasonable certainty that there was no set of facts consistent with the allegations in the complaint upon which the plaintiff would be entitled to any relief against any defendant.[91]

The court therefore had to consider the issue of sovereign immunity against each defendant separately.[92] The court first considered the plaintiff's claims against the Parole Board and the Department of Corrections as legal creatures and entities of the State of Mississippi.[93] In an effort to clarify the confusing statutes of sovereign immunity in Mississippi, the court explained that the "judicially" created doctrine of sovereign immunity was abolished by the Mississippi Supreme Court in *Pruett v. City of Rosedale*.[94] In that decision, the court set July 1, 1984, as the effective date for the recognition of state tort liabil-

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[87] *Id.*

[88] *Id.* at 222. The plaintiff also alleged that the Parole Board and its members were grossly negligent because less than five minutes was spent in considering Jimpson's parole. *Id.*

[89] *Id.* at 221. The plaintiff's complaint was dismissed without the benefit of even pretrial discovery. *Id.*

[90] *Id.* In explaining the procedure posture of this case, the court recognized that Rule 8(a) and (e) of the Mississippi Rules of Civil Procedure displaced any notion of fact pleading in requiring only a short and plain statement of the claim showing that the pleader was entitled to relief. *Id.*

[91] *Id.* The court continued to explain the procedural posture of the *Grantham* case in stating that a motion to dismiss under Rule 12(b) (6) of Mississippi Rules of Civil Procedure was not to be granted unless it appeared beyond a doubt that the plaintiff could prove no set of facts in support of her claim entitling her to relief. *Id.*

[92] *Id.* at 222. The court had to consider the plaintiff's claim against each defendant, or group of defendants, in order to determine whether with reasonable certainty that there were no set of facts entitling the plaintiff to relief against any defendant. *Id.*

[93] *Id.* Sovereign immunity, no qualified public official immunity, was applicable to the Parole Board and the Department of Corrections as they constitute state entities. *Id.*

[94] 421 So. 2d 1046 (Miss. 1982).

ity.[95] The court continued in explaining that in 1984, the legislature enacted a stature waving the sovereign immunity of the state and its political subdivisions.[96] However, the act provided that it was to apply only to claims which occurred on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions.[97] Additionally, the act provided that claims that accrued prior to July 1985, as to the state or, prior to October 1, 1985, as to political subdivisions, were not to be affected by this act, but rather were to be controlled by case law governing sovereign immunity as it existed immediately prior to *Pruett v. City of Rosedale* and by the statutory law governing sovereign immunity existing prior to July 1, 985.[98]

Therefore, the court determined that the issues of liability against the Parole Board and the Mississippi Department of Corrections[99] was controlled by pre-*Pruett* case law because Jimpson was paroled January 9, 1985, and the shooting occurred on February 12, 1985.[100] Hence,

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[95] *Grantham*, 522 So. 2d at 222. The Mississippi Supreme Court abolished the judicially created sovereign immunity in *Pruett*, but the holding of Pruett has never come into effect. *Id.* at fn. 1; *see* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (presently providing that waiver shall apply to claims arising after July 1, 1988, as to the state, and on or after October 1, 1988, as to political subdivisions).

[96] *Grantham*, 522 So. 2d at 223. In response to *Pruett*, the court explained that the legislature enacted a statute that waived the sovereign immunity of the state and political subdivisions, but the act was limited as to when it was to come into effect. *Id.*; *see* Laws, 1984, Ch. 495 (codified at MISS. CODE ANN. § 11-46-1, et seq.). The act specifically provided that waiver was only to apply to claims that accrued on or after July 1, 1985, as to the state, and on or after October 1, 1985, as to political subdivisions. *Grantham*, 522 So. 2d at 222. The court further explained that the act provided that claims that accrued prior to July 1, 1985, as to the state or, prior to October 1, 1985, as to political subdivisions were to be governed by pre-*Pruett* case law and by statutory law governed by pre-*Pruett* case law and by statutory law governing sovereign immunity prior to July 1, 1985. *Id.* Furthermore, the court determined that the legislature has yearly re-enacted the statute governing the claims to which waiver was to apply and had extended the date to 1988. *Id.* at n.1; *see* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (waiver now only applicable to claims arising after July 1, 1988, as to state, and on or after October 1, 1988, as to political subdivision).

[97] *Grantham*, 522 So. 2d at 222. Since legislature has re-enacted the statue and extended the date for the abolition of sovereign immunity, the holding of *Pruett* has never come into effect, nor has the waiver of the act. *Id.*

[98] *Id.*

[99] *Id.* at 222-23. The liability of the Parole Board and the Mississippi Department of Corrections was considered separately from the liability of the Commissioner and the liability of the individual members of the parole board. *Id.* Separate consideration is required because the latter involved qualified public official immunity, not sovereign immunity. *Id.* at 223.

[100] *Id.* at 223. The court determined that the circuit court had erroneously decided that the Parole Board was immune on the basis of "governmental entity" immunity for

both the Parole Board and the Mississippi Department of Corrections were immune from suit for the January/February 1985 tort arising from the performance of governmental functions.[101]

The court next considered the issue of liability against Commissioner Thigpen and the members of the Parole Board.[102] The court began its analysis by recognizing that Mississippi law afforded prison officials a qualified immunity under the ministerial/discretionary dichotomy against civil actions and claims of damage caused by acts or omissions within the performance of their "official" responsibilities.[103]

Hence, the Mississippi Supreme Court affirmed the dismissal of Commissioner Thigpen on the basis that there was nothing to suggest that the plaintiff could have been able to prove that he had committed any intentional tort or had acted substantially at a variance with his authority.[104] Alternatively, the court reversed the dismissal of the members of the Parole Board from the suit, and the court explained that the plaintiff's complaint had charged the Parole Board members

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discretionary functions as provided for in § 11-46-9 (c) of the Mississippi Code. *Grantham*, 522 So. 2d at 223, n.2. The Mississippi Supreme Court explained that the circuit court had erred because that statute was only effective against claims that arose after the time at which the claim in the instant case arose. *Id.* The court continued in its explanation in stating that the discretionary/ministerial doctrine was applicable only to suits against officials, not to suits against the agencies or departments in which they serve. *Id.* Thus, the court found that the statutes governing the Parole Board, probation, and parole decisions were located at MISS. CODE ANN. § 47-7-1, *et seq. Grantham*, 522 So. 2d at 233. The court furthermore determined that these statutes contained no provisions for waiver. *Id.* However, MISS. CODE ANN. § 47-5-1, et seq., which created and controlled the Mississippi Department of Corrections, authorized the acquisition of liability insurance. *Grantham*, 522 So. 2d at 223. The statute allowed the Board, the Commissioner, and regular employees of the correction system to be sued up to the limit of the liability insurance, but the court found the plaintiff had failed to allege that Board in fact had acquired any such liability insurance. *Id.*

[101] *Grantham*, 522 So. 2d at 223.

[102] *Id.* The court reviewed the basis of qualified public official immunity and found that it was necessary evil to provide our poorly paid and overburdened correctional and parole officials a qualified immunity. *Id.*

[103] *Id.* at 225. In addressing the qualified public official immunity of Commissioner Thigpen, the Court found that Mississippi law allowed a governmental official no immunity to a civil action for damages if the breach of such official's legal duty caused injury and if the duty breached constituted a "ministerial." *Id.* Furthermore, the court continued to state that neither was immunity afforded if the duty breaches involved the use of discretion and the governmental actor greatly or substantially exceeded his authority and in the course thereof caused harm, just as no immunity as to be granted to a governmental actor who committed an intentional tort. *Id.*

[104] *Id.*

with gross neglect of their duties.[105] In rejecting the argument that the Parole Board's duties were to be classified as "ministerial," the court found that the alleged gross neglect seemed sufficient to pierce the shield of the Parole Board's qualified immunity.[106]

VI. Liability Insurance and Waiver of Sovereign Immunity

A different aspect of sovereign immunity was addressed by the Mississippi Supreme Court in *Strait v. Pat Harrison Waterway District*.[107] In *Strait*, the court was faced with the task of determining whether a statutory grant of authority to purchase liability insurance waived the sovereign immunity of Pat Harrison Waterway District, a state agency.[108] The issue in this case arose out of an ankle injury which Richard Kim Strait sustained on July 4, 1984, while riding a waterslide.[109] The plaintiff Strait filed suit against Pat Harrison Waterway District due to its role in designing and construction the waterslide amusement park facility at which the injury occurred.[110] Since the trial court granted the defendant's motion for summary judgment on the grounds of the sovereign immunity bar, Strait appealed.[111]

On appeal, the Mississippi Supreme Court first determined whether the legislature had waived the sovereign immunity of Pat Har-

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[105] *Id.* at 226. The court found that the plaintiff had charged the members of the parole board with reckless disregard, and that the members had departed substantially from their statutory duties. *Id.* Hence, the court found that the complaint had stated a claim upon which relief could be granted, but the court stated that it was in no way intimating that the plaintiff should recover. *Id.* Rather, the case was to be remanded to the circuit court to proceed against the members of the parole board as if the motion to dismiss had been denied. *Id.*

[106] *Id.*

[107] 523 So. 2d 36 (Miss. 1988).

[108] *Strait*, 523 So. 2d at 36. Richard Kim Strait appealed from a summary judgment entered against him and in favor of Pat Harrison Waterway District int he Circuit Court of Lauderdale County. *Id.* at 37. Pat Harrison Waterway District was found by the court of constitute a state agency which was charged with the construction of reservoirs, water supplies, and recreational facilities throughout a fifteen-county area in Mississippi. *Id.* (citing Miss. Code Ann. § 51-15-101, et seq. (1972)). The complaint sought damages for personal injuries sustained by Strait at a waterside amusement park which was operated by Pat Harrison Waterway District. *Id.*

[109] *Id.* at 37. Strait, his wife, and their two children went to "Okatibbee Splash Down Country," a waterside amusement park, on July 4, 1984. *Id.* While at the amusement park, the family took several rides on three waterslides, and Strait severally injured his left ankle on one of the sides. *Id.*

[110] *Id.* The plaintiff sought $462,226.12 in damages for the personal injuries he sustained on the waterside. *Id.*

[111] *Id.*

rison Waterway District to the extent of the amount of the general liability insurance purchased by the district which constituted the sum of $2,500,000.[112] The court once again explained that *Pruett v. City of Rosedale*[113] had abolished the doctrine of sovereign immunity prospectively from July 1, 1984, but that the legislature in a negative response to *Pruett* had enacted the Sovereign Immunity Act of 1984.[114] The court further explained that the Sovereign Immunity Act of 1984 as amended extended the prospective date for the abolition of sovereign immunity to July 1, 1988, for the State of Mississippi, and October 1, 1988, for its political subdivisions.[115] Significantly, the act specifically provided that claims against the State or its subdivisions which arose before the 1988 abolition dates were to be governed by pre-*Pruett* case law and statutory law governing sovereign immunity in effect from and after the passage of Chapter 474, Laws of 1985.[116]

Hence, the court then reasoned that since the plaintiff's claim arose on July 4, 1984, then it was controlled by pre-*Pruett* case law and the Sovereign Immunity Act, as amended.[117] Consequentially, under

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[112] *Id.* Furthermore, the statutory authorization for the acquisition of liability insurance provided the following:

> In addition to the acts authorized by Section 51-15-119, the Pat Harrison Waterway District, through its board of directors, is hereby empowered, in its discretion, to purchase comprehensive general liability insurance in such amount or limit as the board of directors may deem advisable in order to protect and indemnify said district against damages resulting from an accident. Premiums accruing on insurance purchased under the provisions of this section shall be paid from the general fund of the district. This section shall stand repealed form and after October 1, 1988.

MISS. CODE ANN. § 51-15-120 (Supp. 1987). Hence, pursuant to this statutory authority, Pat Harrison Waterway District obtained two liability insurance policies. *Strait*, 523 So. 2d at 38.

[113] 421 So. 2d 1046 (Miss. 1982).

[114] *Strait*, 523 So. 2d at 38; *see* MISS. CODE ANN. § 11-46-1, et seq. (Supp. 1987) (Sovereign Immunity Act of 1984 as amended has extended prospective date for abolition of sovereign immunity to July 1, 1988, for state, and October 1, 1988, for political subdivisions which arose before the 1988 abolition dates to be governed by pre-*Pruett* case law and by statutory law in effect from the after the passage of Chapter 474, Laws of 1985. *Strait*, 523 So. 2d at 38.

[115] *Strait*, 523 so. 2d at 38. The court determined that Chapter 474, Laws of 1985, constituted the present version of the Sovereign Immunity Act. *Id.* at 38, n.1. The court continued in stating that Chapter 474, Laws of 1985, together with minor amendments provided by Chapter 438, Laws of 1986, and Chapter 483, Laws of 1987, were now codified at MISS. CODE ANN. § 11-46-1, *et seq.* (Supp. 1987). *Strait*, 523 So. 2d at 38, n.1.

[116] *Strait*, 523 So. 2d at 38, n.1; *see* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (present version of Sovereign Immunity Act).

[117] *Strait*, 523 So. 2d at 38.

this law, the State and its subdivisions were not subject to suit in the absence of express statutory authority, and the court explained that this express statutory authority was not to be implied unless the implication was made clear and unambiguous by the enabling statute.[118]

However, statutory construction problems arose concerning whether sovereign immunity had been waived from the mere statutory authorization to purchase liability insurance.[119] The court found that Pat Harrison Waterway District had in fact obtained two liability insurance policies, and these policies were in force at the time of the plaintiff's injury in 1984.[120] The issue of statutory interpretation that the court faced in this case concerned the fact that the previous cases which addressed this issue had come before the court at a time when there was no statutory authority for the governmental entities' purchase of insurance,[121] and additionally that the present statute which authorized this purchase of liability insurance was silent as to its effect on immunity.[122]

In resolving this statutory interpretation, the court explained that at least twenty-nine varieties of state subdivisions were authorized by statutes could generally be categorized into three groups: (1) those which expressly state that the subdivision was still protected by sovereign immunity notwithstanding the authority to purchase insurance;[123] (2) those which expressly stated that sovereign immunity was waived to the extent of the insurance coverage purchased;[124] and (3) those

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[118] *Id.*

[119] *Id.*; *see* MISS. CODE ANN. § 51-15-120 (Supp. 1987) (statutory authorization for the purchase of liability insurance).

[120] *Strait*, 523 So. 2d at 38. Pat Harrison Waterway District had obtained two policies which totaled $2,500,000 in liability coverage. *Id.* Strait contended that the statutory authorization for the purchase of liability insurance impliedly waived sovereign immunity to the extent of the insurance purchased. *Id.*

[121] *Id.*; *see* Prench v. Pearl River Valley Water Supply Dist., 394 So. 2d 1385, (Miss. 1981) (finding that mere purchase of liability insurance by governmental entity had not waived sovereign immunity, but there was not statutory authority for purchase of liability insurance at that time); Joseph v. Tenn. Partners, Inc., 501 So. 2d 371, (Miss. 1987) (finding no waiver of sovereign immunity due to purchase of liability insurance without express statutory authority).

[122] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 51-15-120 (Supp. 1987) (statutory authority for purchase of liability insurance by Pat Harrison Waterway District).

[123] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 55-9-89 (Supp. 1987) (expressly reserved sovereign immunity of County Park Commissioner); MISS. CODE ANN. § 65-1-8 ¶ (Supp. 1987) (expressly reserving sovereign immunity of Highway Department).

[124] *Strait*, 523 So. 2d at 41; *see* MISS. CODE ANN. § 19-5-99 (Supp. 1987) (sovereign immunity expressly waived to extent of insurance purchased for Economic Development District); MISS. CODE ANN. § 19-7-8 (Supp. 1987) (sovereign immunity expressly waived

which were silent as to the effect, if any, on sovereign immunity.[125]

The court then reasoned that the omission of language waiving sovereign immunity indicated that the legislature had not intended the waiver to apply, and furthermore that the statute in question was both unclear and ambiguous with respect to sovereign immunity due to the

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to extent of insurance purchased for Counties); MISS. CODE ANN. § 21-15-6 (Supp. 1987) (sovereign immunity expressly waived to extent of insurance purchases for municipalities); MISS. CODE ANN. § 33-7-304 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for school districts); MISS. CODE ANN. § 37-29-83 (Supp. 1987) (expressly waiving sovereign immunity to extent to insurance purchased for junior colleges); MISS. CODE ANN. § 37-29-85 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchased for junior college boards); MISS. CODE ANN. § 41-13-11 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for community hospitals); MISS. CODE ANN. § 41-29-108 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchased for Bureau of Narcotics); MISS. CODE ANN. § 41-55-5 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for County Public Ambulance Service); MISS. CODE ANN. § 41-61-63 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for State Medical Examiner); MISS. CODE ANN. § 43-27-10 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Department of Youth Services); MISS. CODE ANN. § 45-5-75 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Board of Corrections); MISS. CODE ANN. §57-32-5 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for Southwest Mississippi Industrial Council); MISS. CODE ANN. § 59-17-31 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for State Inland Port Authority); MISS. CODE ANN. § 61-3-15 (Supp. 1987) (expressly waiving sovereign immunity to extent of insurance purchases for airport authorities).

[125] *Strait*, 523 So. 2d at 42; *see* MISS. CODE ANN. § 21-27-17 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Public Utility Commissions); MISS. CODE ANN. § 21-37-37 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Park Commissions); MISS. CODE ANN. § 41-19-33 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Regional Mental Retardation Commissions); MISS. CODE ANN. § 45-1-19 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Department of Public Safety); MISS. CODE ANN. § 49-1-60 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Department of Wildlife Conservation); MISS. CODE ANN. § 51-15-120 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Pat Harrison Waterway District); MISS. CODE ANN. § 57-13-5 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Research and Development Center); MISS. CODE ANN. § 51-13-13 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to State Military Department); MISS. CODE ANN. § 73-31-7 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to State Board of Psychological Examiners); MISS. CODE ANN. § 77-5-725 (Supp. 1987) (silent as to effect of acquisition of insurance on sovereign immunity with respect to Municipal Utility Commission Joint Agencies).

absence of an express waiver provision.[126] The court then reasoned that since a waiver of sovereign immunity was to be implied only where the statute was clear and unambiguous, then the statutory grant of authority to purchase liability insurance had not waived Pat Harrison Waterway District's sovereign immunity.[127] Therefore, the court found that the action was banned by the doctrine of sovereign immunity and affirmed the judgment of the circuit court.[128]

The court once again addressed sovereign and public official sovereign immunity and the implication of the acquisition of liability insurance in *Region VII Mental Health v. Isaacs*.[129] In *Isaacs*, the family of John Isaacs instituted a wrongful death action for the death of Isaacs who was stabbed by his roommate in the Supervised Apartment Program established by Region VII.[130] The defendants named in the action were Region VII, its individual commissioners, and an employee of Region VII in the Supervised Apartment Program.[131] The complaint

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[126] *Strait*, 523 So. 2d at 39-40. The court concluded that the legislature had expressed a policy regarding the shown subject of sovereign immunity in the Sovereign Immunity Act of 1984. *Id.* at 40. The court found that the policy expressed in the Sovereign Immunity Act of 1984 was to remain in force until 1988. *Id.* Therefore, the court was required to construe all the statutes enacted on sovereign immunity together in order to determine the legislative intent on the whole subject. *Id.*

[127] *Id.*

[128] *Id.* at 41. The court also rejected the proposition that the Pat Harrison Waterway District was engaged in a proprietary enterprise and thus was removed from the protection of sovereign immunity. *Id.* at 40. The court explained that the "proprietary/governmental" test for waiver of immunity applied only to municipalities. *Id.* The court continued to state that the test for waiver of sovereign immunity of a municipality was different in origin and in scope from the sovereign or governmental immunity of the state. *Id.*

Finally, the court rejected the plaintiff's third proposition which asserted that since the defendant district had entered into a business relationship which was contractual in nature, then the defendant district had waived sovereign immunity. *Id.* The court did recognize that when the legislature authorized the state's entry into a contract, the state consequentially waived its immunity from suit for breach of that contract, but the court found that the suit had proceeded solely on a negligence theory and the duty owed to a business invitee. *Id.* at 41. Therefore, the court found this third proposition to be without merit. *Id.*

[129] 523 So. 2d 1013 (Miss. 1988).

[130] *Isaacs*, 523 So. 2d at 1013. The plaintiffs sought to recover $1,000,000 actual and $1,000,000 punitive damages for the wrongful death of John Isaac. *Id.* The facts reveal that John Isaacs and James Bishop were roommates in the Supervised Apartment Program established by the Region VII Mental-Health Retardation Commission. *Id.* The Supervised Apartment Program provided commercially available units for lease to certain disabled adults enrolled in the program. *Id.*

[131] *Id.* at 1014. The duties of the Region VII commissioners were found by the court to be enumerated under § 41-19-33 of the Mississippi Code Annotated. *Id.* at 1016. The

alleged that the defendants owed a duty of reasonable care with regard to the protection of John Isaacs and further that this duty had been negligently breached in the course and scope of the defendant's employment rendering them jointly and severally liable for damages for the wrongful death of John Isaacs.[132] The circuit court denied the defendants' motion for summary judgment which was based upon the defense of sovereign immunity and qualified public official immunity, and the defendants' motion for interlocutory appeal was thereafter granted to address the denial of the motions for summary judgment.[133]

On appeal, the Mississippi Supreme Court first found that this controversy was controlled by pre-*Pruett* case law and statutory law in effect prior to July 1, 1984, since Isaacs' claim arose on March 5, 1981.[134] Then the court addressed the statutory authorization for the acquisition of liability insurance.[135] Following the reasoning of *Strait v. Pat Harrison Waterway District*[136] the court found that the mere acquisition of liability insurance by a governmental entity did not waive sovereign immunity.[137] Therefore, the court found that the motion for summary judgment made by defendant Region VII was improperly denied as there was no express statutory waiver.[138]

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duties consist of the following: administration of programs; the establishing, owning, and leasing of mental health facilities; the entering into contracts with state and federal governments, and their agencies; the employment of personnel in the mental health facilities; and the promotion of the general mental health of the people of the region. *Id.* at 1016 (citing MISS. CODE ANN. § 41-19-33 (f) (1972)). The employee of Region VII, George Renaker, was charged with negligent supervision. *Id.* at 1017. Renaker was first employed in 1981, and he held the position of "Community Living Coordinator" for the supervised apartment program. *Id.* He was able to have daily contact with each resident in the program since pursuant to his capacity as Community Living coordinator, he lived at the apartments. *Id.* Renaker's responsibilities encompassed supervision of the clients with respect to their jobs and daily activities. *Id.*

[132] *Id.*

[133] *Id.* at 1015.

[134] *Id.* The court determined that under pre-*Pruett* case law and statutory law in effect prior to July 1, 1984, the state and its subdivisions were not subject to suit in absence of express statutory authority. *Id.* The court continued in stating that express statutory authority was not to be merely implied unless the implication was clear and unambiguous. *Id.*

[135] *Id.*

[136] 523 So. 2d 36 (Miss. 1988).

[137] *Isaacs*, 523 So. 2d at 1015. After determining that the acquisition of liability insurance was provided for under the enabling statute authorizing regional commissions as Region VII, the court concluded that there was by no means any indication of an explicit waiver as required by Mississippi case law. *Id.*

[138] *Id.* at 1016, 1018. The court furthermore found that the Region VII commissioners were entitled to "public official immunity" in that they had acted in a purely discre-

VII. Judicially Created Sovereign Immunity Versus the Legislative Doctrine of Sovereign Immunity

In *Webb v. Lincoln County*,[139] the Mississippi Supreme Court clearly explained that the holding of *Pruett v. City of Rosedale*,[140] which abolished the judicially created sovereign immunity, had never come into effect.[141] The court recognized that the court had previously set July 1, 984, as the effective date for the recognition of state tort liability, but that since 1984, the legislature had repeatedly enacted a legislative doctrine of sovereign immunity, with each set to repeal at the end of the fiscal year following the legislative session during which it was enacted.[142]

The dispute in *Webb* arose in 1986 when the vehicle in which the Webbs were riding proceeded through an unmarked "T" intersection and struck a tree.[143] The Webbs thereafter filed suit against the Mississippi State Highway Department, in its official capacity, and Lincoln County and its five supervisors in their individual and official capacities.[144] The complaint alleged that the defendants had failed to prop-

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tionary manner as opposed to ministerial. *Id.* at 1016-17. The court reasoned that the commissioners' acts constituted purely discretionary decisions made by the board as a whole regarding program establishment and implementation, and consequentially their motions for summary judgment were improperly denied. *Id.* at 1017.

Then, in analyzing the application of the qualified immunity normally granted to public officials as extending to the Region VII employee, the court relied on the principals established in *Marshall v. Chawla*. *Id.* at 1017. The court reasoned that *Marshall v. Chawla* allowed qualified public official immunity to extend to the defendant employee in that qualified public official immunity applied not only to decisions with instituting a program for control, but also to the treatment administered in carrying out such policies. *Id.* at 1017-18. The court thus concluded that qualified public official immunity extended to the defendant employee just as it extended to Dr. Chawla in *Marshall v. Chawla*. *Id.* at 1018.

[139] 536 So. 2d 1356 (Miss. 1988).

[140] 421 So. 2d 1046 (Miss. 1982).

[141] *Webb*, 530 So. 2d at 1358.

[142] *Id.*

[143] *Id.* Christopher Robert Webb, his wife, and their young son, were traveling in Lincoln County, Mississippi, on a rainy and foggy night when the accident occurred. *Id.* The Webbs were traveling down "Robert Adams Road" when the road suddenly came to an end without any warning. *Id.* The accident inflicted serious injuries on Mrs. Webb which consisted of a broken nose, broken maxilla, broken shoulder, broken ankle, and broken facial bones. *Id.* The Webbs alleged that the intersection had previously been marked by a stop sign, and that the failure to supervise and safely maintain the intersection had caused the injuries. *Id.*

[144] *Id.* The Mississippi State Highway Commission and its director, John R. Tabb, denied any obligation to maintain the intersection at which the accident occurred. *Id.* On appeal, the Mississippi Supreme Court agreed, and the court explained that unless cer-

erly supervise or maintain the intersection in a reasonably safe manner, and that the defendants had failed to warn of the condition existing at the intersection, and finally that the defendants failed to properly maintain the intersection according to the uniform traffic control device manual.[145] The circuit court granted the defendants' motion to dismiss.[146]

On appeal, the Mississippi Supreme Court initially determined that the Webbs' claim was controlled by pre-*Pruett* case law and statutory law even though the claim arose in 1986.[147] In explaining the ambiguities between the judicially created sovereign immunity and the legislatively created sovereign immunity, the court relied on the case of *Grantham v. Department of Corrections.*[148] The court found that *Grantham* confirmed the fact that the legislature had re-enacted the doctrine of sovereign immunity during the recent legislative session, and consequentially, waiver was to claims arising after July 1, 1988, as to the state and on or after October 1, 1988, as to political subdivisions.[149] Therefore summary judgment was proper against Mississippi Highway Commission and Department.[150] The court concluded in stating that all routes of action were foreclosed to the Webbs due to the present state of sovereign immunity in Mississippi, and therefore, the court affirmed the dismissal of the action.[151]

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tain highways were designated as "state" highways, the State Highway Commission and the Highway Department were not responsible for their construction and maintenance. *Id.* at 1359. Furthermore, the court determined that the Lincoln County Supervisors had full jurisdiction over roads, ferries, and bridges. *Id.* (citing MISS. CODE ANN. § 19-3-41 (1972)).

[145] *Id.* at 1357.

[146] *Id.* The circuit court held that this dispute was governed by Brazeale v. Lewis and United States Fidelity & Guaranty Company, 498 So. 2d 321 (Miss. 1986), and therefore sustained the defendant's Rule 12(b)(6) motion. *Webb*, 536 So. 2d at 1357.

[147] *Webb*, 536 So. 2d at 1358.

[148] 522 So. 2d 219 (Miss. 1988). When the judicially created sovereign immunity was abolished, the court found that the legislature then enacted a legislative sovereign immunity. *Webb*, 536 So. 2d at 1358.

[149] *Webb*, 536 So. 2d at 1359. *See* MISS. CODE ANN. § 11-46-6 (Supp. 1987) (providing that waiver was to apply only to claims which arose after July 1, 1988, as to the state, and on or after October 1, 1988, as to political subdivisions).

[150] *Webb*, 536 So. 2d at 1360. The court affirmed the judgment of the circuit court. *Id.*

[151] *Id.* The complaint dated january 30, 1987, was dismissed due to the bar of legislative sovereign immunity, not judicial sovereign immunity. *Id.*

VIII. MISCELLANEOUS

The Mississippi Supreme Court was presented with many diverse issues in the area of tort law during 1988 which, though noteworthy, were not selected for textual commentary. The diverse areas addressed by the court included jury instructions,[152] damages,[153] respondeat supe-

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[152] Turner v. Turner, 524 So. 2d 942, 947 (Miss. 1988). In *Turner*, the Mississippi Supreme Court found that where the standard was that of reasonable car, jury instructions that imposed an absolute duty on the defendant constituted reversible error. *Id.* at 944. The first instruction complained of in *Turner* stated that Turner was required ". . . to decrease her speed as may be necessary to avoid colliding with any person, vehicle, or other conveyance on the highway." *Id.* The second instruction complained of contained the language, ". . . but that at all times and under all circumstances she was required to be diligent and to anticipate the presence of vehicles,. . .". *Id.* The court held that these two instructions when read together placed a higher standard of care on the defendant than that of reasonable care. *Id.* at 947.

In Graves v. Graves, 531 So. 2d 817, 822 (Miss. 1988), the court determined what evidence was sufficient to support a jury instruction for present and future medical expenses. The court held that the plaintiff was incompetent to testify as to the treating physician's prognosis and projected course of treatment as a basis proof of future medical expenses. *Id.* at 822. The court additionally found that the plaintiff's own testimony of increased eye discomfort during the exercise of manual labor was not proof of lost of earning capacity. *Id.*

In reversing due to an error of the circuit court in granting a contributory negligence instruction, the court in Anderson v. Hensley-Smidt, 530 So. 2d 181, 185 (Miss. 1988). found that the negligence of a supervisor was not to be imputed to a manual laborer under his control absent evidence that the laborer was on notice of the supervisor's incompetence or that the laborer had failed to take into account some safety precaution. *Id.*

Similarly, the court in M & M Pipe and Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615, 622 (Miss. 1988). reversed and remanded on the issue of damages only. The court found that in determining wrongful death damages, evidence of lack of child support was highly relevant evidence which was proper for the jury's consideration, and that any problem concerning its relevance to the particular issue was to be handled through appropriately drafted instructions. *Id.*

[153] Rotwein v. Holman, 529 So. 2d 173, 177 (Miss. 1988). In affirming the judgment of the circuit court, the *Rotwein* court found that a jury verdict was not to be overturned when there was substantial evidence to support its verdict and when the issue of damages was thoroughly presented to the jury in the court's instructions. *Id.* The lower court in *Rotwein* had granted a peremptory instruction on liability against Holman and in favor of the appellant *Rotwein*. *Id.* Thus, the jury was instructed to determine the amount of damages only, and the jury denied recovery to Rotwein, a sixty-five-year-old woman, for personal injuries allegedly sustained in a automobile accident. *Id.*

Then, in McGowan v. Est. of Ruby Wright, 524 So. 2d 308, 311 (Miss. 1988), the Mississippi Supreme Court addressed the appropriate measure of damages for the wrongful death of a sixty-seven-year-old male. The jury returned a verdict in *McGowan* for the plaintiffs in the amount of the actual damages, but awarded no punitive damages. *Id.* at 310-11. The Mississippi Supreme Court found that an award of punitive damages

rior liability,[154] premises liability,[155] duty owed to a business invitee,[156]

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was within the discretion of the jury, and additionally that punitive damages were only allowed to be awarded by the jury where gross negligence or willful misconduct had been proven. *Id.* at 311. Furthermore, the court explained that MISS. CODE ANN. § 11-7-13 (Supp. 1984) provided that in wrongful death actions, damages were to be recovered in the amount as the jury determined to be just when taking into account all damages of every kind to the decedent and to all the parties interested in the suit. *McGowan*, 524 So. 2d at 308. The court found that this statutory language had been construed to include (1) the present cash value of the life expectancy of the deceased, (2) the loss of the companionship and society of the decedent, (3) the pain and suffering of the decedent between the time of the injury and death, and (4) punitive damages. *Id.* However, the court upheld the jury verdict which reflected that the only damages sustained were the funeral expenses and ambulance fees and that no damages for loss of society and companionship were sustained by the widow. *Id.*

Similarly, in addressing the appropriate measure of damages for loss of consortium, the court in Choctaw, Inc. v. Wichner, 521 So. 2d 878, 882 (Miss. 1988), held that a loss of consortium award was to be reduced according to the amount of negligence imputed upon the injured spouse. The Mississippi Supreme Court granted certification in *Choctaw* on the noninjured spouse's award for loss of consortium was to be reduced as the injured spouse's damages were for contributory negligence. *Id.* The court found that the right to damages for loss of consortium was deemed to be derivative, and therefore, the noninjured spouse was to have no better standing in court than the contributorily negligent spouse. *Id.*

The court reversed and remanded in the case of Gibbs v. Banks, 527 So. 2d 658, 660 (Miss. 1988), because an additur was awarded which was based in an implicit finding of an inadequate award. In *Gibbs*, the trial judge denied the plaintiff's motion for a new trial provided that the defendant accepted a $12,700 additur in favor of the plaintiff. *Id.* The court determined that the trial judge was allowed to usurp the jury's function in awarding an additur only when the jury's verdict was so shocking to the conscience that it evidence bias, passion and prejudice, or that the verdict was contrary to the overwhelming weight of the credible evidence. *Id.* Absent either of these findings, the court explained that the trial court had abused its discretion conditioned upon the non-acceptance of an additur or remittitur. *Id.*; *see* MISS. CODE ANN. (Supp. 1987) (statutory authority for imposing condition of additur or remittitur).

[154] Fruchter v. Lynch Oil Co., 522 So. 2d 195, 201 (Miss. 1988). In *Fruchter*, the Mississippi Supreme Court held that no principal/agent relationship existed where an owner of a gas station had no actual or substantial control over the employees of the operator who had leased the station from the owner in a month-to-month tenancy. *Id.* The dispute in *Fruchter* arose out of an injury which occurred at a Shell service station which was operated by Robert E. Keel and owned by Lynch Oil Company. *Id.* On appeal, the court affirmed the dismissal of Lynch Oil from the suit. *Id.*

[155] Jerry Lee's Grocery, Inc. v. Thompson, 528 So. 2d 293, 296 (Miss. 1988). In reversing, the Mississippi Supreme Court found in *Jerry Lee's Grocery, Inc.*, that the owner or operator of business premises owned a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition and, if the operator was aware of a dangerous condition not readily apparent to the invitee, then he was under a duty to warn the invitee of such condition. *Id.* at 296. The court further stated that when a dangerous condition on the premises was caused by the operator's own negligence, no knowledge of its existence needed to be shown. *Id.* at 295. However, the court recognized

duty owed to a licensee,[157] and product liability.[158]

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that Mississippi case law established that the owner or occupant was not an insurer against all injuries. *Id.* The court thus found that when a dangerous condition on the premises or floor was caused by at third party unconnected with the store operation, then the burden was upon the plaintiff to show that the operator had actual or constructive knowledge of its presence. *Id.* at 296.

In *Jerry Lee's Grocery, Inc.*, the court found that there was no evidence of negligence on behalf of Jerry Lee's Grocery, Inc., with respect to a "Pine Power" puddle on the floor, and the court was therefore required to reverse and to enter judgment for Jerry Lee's Grocery, Inc. *Id.*

[158] Grisham v. John Q. Long, V. F. W. Post No. 4057, Inc., 519 So. 2d 413, 417 (Miss. 1988). The court in *Grisham* considered for the first time the duty of one selling alcohol on the premises to protect its patrons from assaults by other patrons. *Id.* The court determined that the VFW, though not an insurer of its patron's safety, had a duty to exercise reasonable care to protect from reasonable foreseeable injury. *Id.* at 416. Nonetheless, the court found that the lack of adequate lighting outside the V.F.W. door had not been shown to be the proximate cause of an attack which did in fact occur outside the V.F.W. door. *Id.* at 417. The court therefore found that summary judgment in favor of V.F.W. was appropriate since proximate cause was an essential element of the plaintiff's claim. *Id.*; *see* Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2252-53 (1986) (finding that party who opposes summary judgment on claim or defense has burden as to elements that such opposing party would bear the burden of proof at trial, and when the moving party can show a complete failure of proof on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law); Fruchter v. Lynch Oil Company, 522 So. 2d 195, n.1 (Miss. 1988) (explaining that Federal Rule 56 was identical to Mississippi Rule 56 and discussing recent cases recognizing that quantum of proof required of burdened party at trial informs content of whether showing of genuine issue of material fact has been made so as to avoid summary judgment). Galloway et al. v. The Travelers Ins. Co. et al., 515 So. 2d 678, 683 (Miss. 1987) (following construction placed upon language of Rule 56, Fed. R. Civ. P., in *Celotex*);

[157] Lucas v. Buddy Jones Ford Lincoln Mercury, Inc., 518 So. 2d 646, 649 (Miss. 1988). In *Lucas*, the court determined that a business owner only had the duty not to willfully or wantonly harm a person who entered the business premises for such person's own personal benefit. *Id.* The dispute in *Lucas* arose when Joyce Lucas slipped and fell on ice that had accumulated at Buddy Jones Ford Dealership when she was picking her some up from her husband, an employee at the dealership. *Id.* at 647. In finding that Joyce Lucas constituted a licensee, the court rejected the contention that Lucas had an implied invitation to visit the dealership which was allegedly derived from encouragement for relatives of employees to pick up payment checks. *Id.* at 648-49. The court explained that there was no business purpose of Lucas's visit and further that the dealership derived no benefit from her visit. *Id.* Thus, the court determined that where the undisputed facts disclosed that a plaintiff was a mere licensee, then the court was not to allow the jury to consider the question of whether or not his status was otherwise. *Id.* at 649. Summary judgment was therefore properly granted. *Id.*

[158] Holifield v. Getty Oil Co., 533 So. 2d 1112, 1118 (Miss. 1988). The Mississippi Supreme Court held in *Holifield* that an oil well did not constitute a product for purposes of strict liability in tort and further, that the doctrine of strict liability in tort was not applicable to the construction of an oil well by an oil company for its own use. *Id.* at

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1118 In explaining its reasoning, the court stated that an isolated sale of an oil well use did not constitute "engaging in the business of selling of oil wells" for purposes of strict liability. *Id.* at 1115-116 The court concluded that summary judgment had been properly granted even though discovery had not been completed. *Id.* at 1118.

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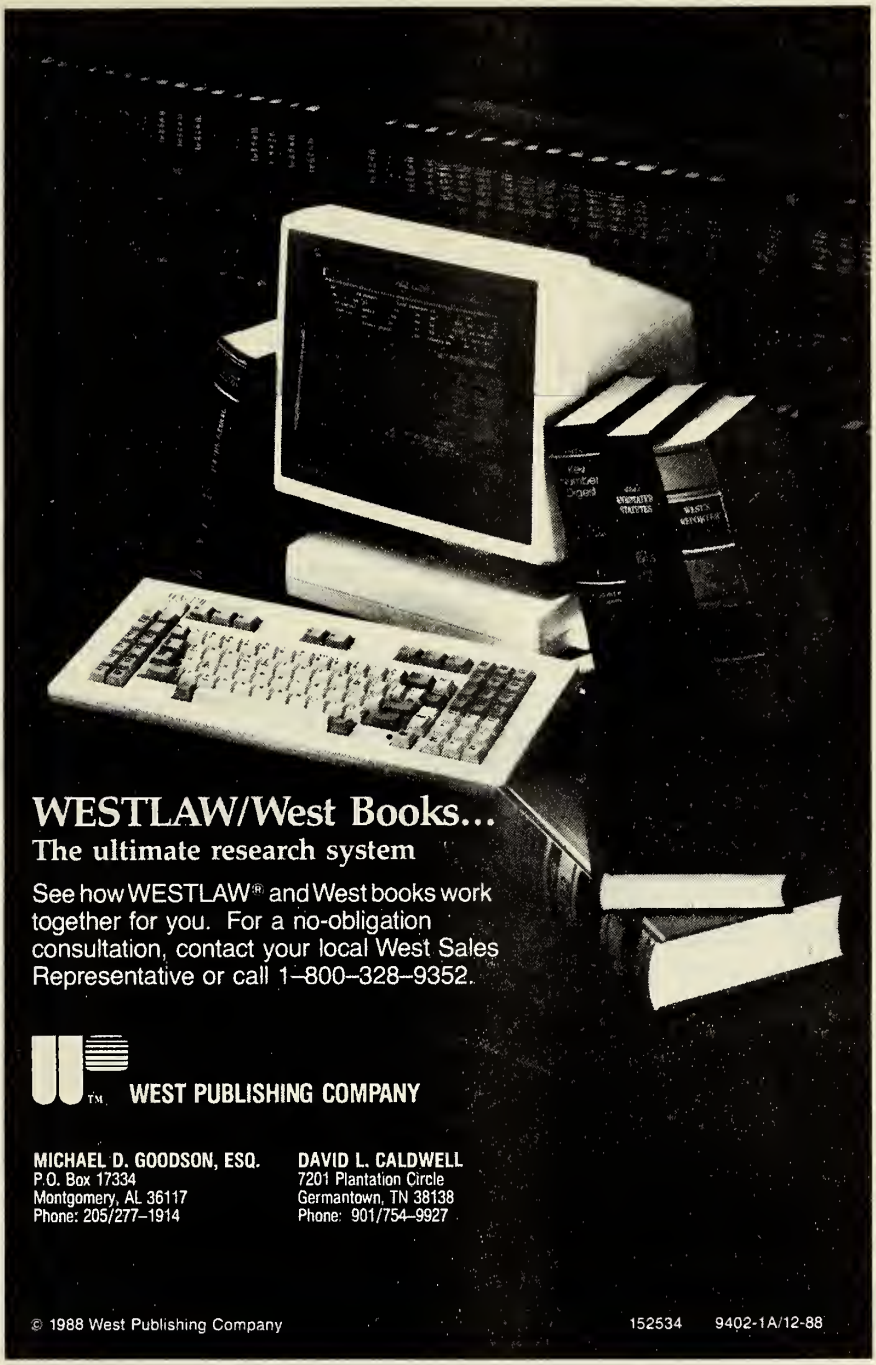

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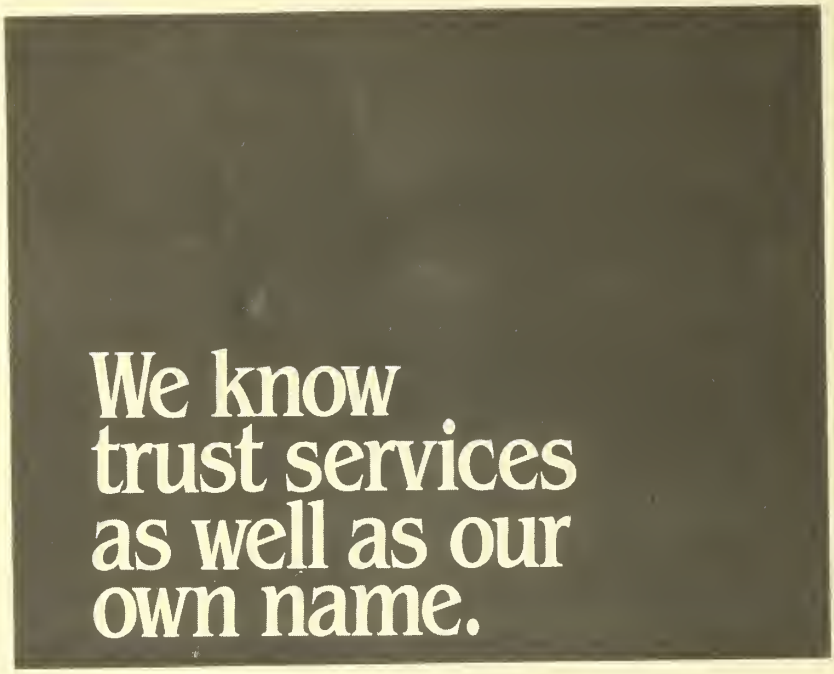

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